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IN THE

Supreme Court of the United States

PAPPAS TELECASTING OF SOUTHERN CALIFORNIA, L.L.C.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Federal Communications Commission exceed its statutory authority by issuing initial licenses for advanced television services without written application as required by 47 U.S.C. § 308?

2. Was the determination of the Federal Communications Commission not to allocate a paired digital television channel to petitioner arbitrary or capricious, where the agency reversed, without rational explanation, its earlier decision to award petitioner such a channel and rejected, without consideration, petitioner's evidence that there was a noninterfering channel available?

PARTIES TO THE PROCEEDINGS

The parties before this Court appear in the caption of the case on the cover page. The proceeding in the court whose judgment is the subject of this petition included the following additional parties: Community Television, Inc.; Pennsylvania Telecasters Association; Minority Television Project, Inc.; Paxson Communications Corporation; Corridor Television, L.L.P.; and Entravision Communications Company, L.L.C. These additional parties are being served as respondents herein.

RULE 29.6 STATEMENT

Petitioner has no parent company and no publicly held company owns 10 percent or more of petitioner's stock.

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Pappas Telecasting of Southern California, L.L.C. ("Pappas") petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 7, 2000. This case presents important questions regarding the interpretation of the Communications Act of 1934 (the "Communications Act"), 47 U.S.C. § 151, *et seq.*, and the proper exercise of licensing authority thereunder by the Federal Communications Commission.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 216 F.3d 1133 (D.C. Cir. 2000) and is reprinted in the appendix hereto ("App.") at 1a. The judgment entered by the Court of Appeals is reprinted at App. 28a.

STATEMENT OF JURISDICTION

The District of Columbia Circuit entered judgment in this case on July 7, 2000. App. 28a. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 308(a) of Title 47, United States Code, provides, in relevant part: "The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it. . . ." App. 30a.

Section 316(a)(1) of Title 47, United States Code, provides, in relevant part: "Any station license or construction permit may be modified by the Commission . . . if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act . . . will be more fully complied with." App. 32a.

Section 336(a)(1) of Title 47, United States Code provides:

> If the Commission determines to issue additional licenses for advanced television services, the Commission should limit the initial eligibility for such licenses to persons that, as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct such a station (or both). App. 33a-34a.

STATEMENT OF THE CASE

This case arises out of the refusal by the Federal Communications Commission (the "FCC" or the "Commission") to allocate a paired digital television channel to petitioner Pappas in the course of a proceeding by the Commission to establish rules and issue licenses for conversion of the nation's existing analog television service to digital television service ("DTV"), also known as advanced television service.

In the proceeding below, the Commission granted licenses for a second broadcasting channel (a "paired DTV channel") to all persons holding a license to operate or a permit to construct an analog television broadcast station as of April 3, 1997, the date the Commission deemed the new DTV licenses to be "issued." However, the Commission did not allocate a paired DTV channel to Pappas, which has been granted a permit to construct a new analog television station in Avalon, California, because, as of the April 3, 1997 date the Commission selected for "issuance" of the new DTV licenses, Pappas's application to construct, filed back in 1986, was still pending and had not yet been granted by the Commission. The Commission thus deemed Pappas "ineligible" to receive a DTV license, citing Congress's directive in the Telecommunications Act of 1996 (the "1996 Act") that eligibility for new DTV licenses should be limited to "persons that, as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct such a station (or both); . . . ." App. 33a-34a.

In 1987, the FCC began a rulemaking proceeding to implement advanced television systems. *In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, MM Docket 87-268 (the "DTV proceeding"). DTV offers better sound and picture quality, as well as greater spectrum efficiency. As opposed to analog television, which occupies the entire six-MegaHertz bandwidth of a television channel with a single program, DTV permits one or more programs to be transmitted simultaneously in a variety of transmission formats.

To facilitate the transition from analog television service (also known as "NTSC") to digital television service, the Commission proposed a transition period during which

existing broadcasters would temporarily be given two separate channels: one on which to broadcast programming to existing NTSC television receivers, and a second channel on which to broadcast DTV to new digital receivers. This transition period will terminate no sooner than the end of 2006, at which time all broadcasters must return one of the two channels to the Commission, and must broadcast only digital signals on the remaining channel.

During the transition period, a broadcaster awarded a paired DTV channel may use that DTV channel to offer additional, "ancillary" services (such as enhanced video or data features) that are not technically possible to provide in the analog format. Holders of a paired DTV channel thus have the opportunity to provide viewers with all of the benefits of digital service, while simultaneously being able to reach their analog viewers and transition those viewers to their new digital service. This "dual service" capability gives paired DTV channel holders a substantial advantage over any competitor holding only one, six-MegaHertz channel on which to broadcast either an analog signal (which must be discontinued upon completion of the conversion to DTV) or digital service (which can only be received by viewers with DTV receivers that are not currently in wide circulation.).

In 1992, the Commission determined that initial eligibility for paired DTV channels would be limited to "(1) all full-service television broadcast station licensees; (2) permittees authorized as of [October 24, 1991]; and (3) all parties with applications for a construction permit [to build a new analog station] on file as of October 24, 1991, who are ultimately awarded full-service television broadcast station licenses." *Third Report/Further Notice*, ¶ 8, 7 F.C.C.R. 6924, 6930 (Oct. 16, 1992). Pappas, as the

successor in interest with respect to an application filed in 1986, was therefore eligible for a paired DTV channel.[1]

In February 1996, Congress addressed the question of eligibility for paired DTV channel allotments in Section 201 of the 1996 Act, stating:

> If the Commission determines to issue additional licenses for advanced television services, the Commission — (1) should limit the initial eligibility for such licenses to persons that, as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct such a station (or both); . . . . App. 33a-34a.

A few months after passage of the 1996 Act, on July 25, 1996, the Commission adopted its *Sixth Further Notice of Proposed Rulemaking* in the DTV proceeding, in which the Commission declared that "existing broadcasters eligible for a DTV channel will include . . . all parties with applications for a construction permit on file as of October 24, 1991, who are ultimately awarded full-service broadcast station licenses [*i.e.*, the pending applicants]." Lodging App. L-6, ¶ 10. The Commission explicitly found that this proposal was "consistent with the provisions of the 1996 Telecommunications Act regarding initial eligibility for licenses." Lodging App. L-7, ¶ 10. Because Pappas's application for a construction permit was on file as of October

1. An application to the Commission for a permit to construct a new television broadcasting station at Avalon, California was filed in 1986 by Island Broadcasting Limited Partnership. Pappas succeeded to that application. Accordingly, the applicant will be referred to as "Pappas" throughout this petition.

24, 1991, Avalon, California was tentatively allotted a paired DTV channel in the *Sixth Further Notice.*

However, eight months later, the Commission changed course, abruptly and without explanation. In its *Fifth Report and Order*, adopted on April 3, 1997, the Commission purported to "issue" DTV licenses to all persons it deemed eligible on that date. Lodging App. L-134, ¶ 68 ("[W]e issue, by this paragraph . . . additional DTV licenses. . . ."). Rather than include pending applicants (such as Pappas) among those persons eligible for the new paired DTV channels, as it had stated it would do in the *Sixth Further Notice*, the Commission limited eligibility for paired DTV channels "to those broadcasters who, as of the date of issuance of the initial [DTV] licenses [*i.e.*, April 3, 1997], hold a license to operate a television broadcast station or a permit to construct such a station, or both." Lodging App. L-111, ¶ 17.[2]

The Commission arrived at this decision by deeming that it had issued all of the "initial DTV licenses" in its accompanying *Sixth Report and Order* adopting a Table of Channel Allotments for DTV. *See* Lodging App. L-319, ¶ 9. Although Pappas's application was on file prior to October 24, 1991, the DTV Table of Channel Allotments adopted by the Commission did not include a paired DTV channel for Avalon, California.

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2. The Commission also stated that it would "give particular consideration for assigning temporary DTV channels to new licensees who applied on or before October 24, 1991, given the reliance that these parties may have placed on rules we adopted before passage of the 1996 Act." Lodging App. L-112, n.26. However, the Commission never awarded the pending applicants a paired DTV channel, temporary or otherwise.

On reconsideration of the *Fifth Report and Order*, while acknowledging its earlier promise to "give particular consideration" to the pending applicants, and even while noting that these "parties themselves did nothing to delay the processing of their applications and make themselves ineligible for initial DTV licenses," Lodging App. L-273, ¶ 12, the Commission continued to deny paired DTV channels to analog station permittees whose applications had not been granted by April 3, 1997, the date that the Commission adopted its *Fifth Report and Order* and *Sixth Report and Order*. Instead, the Commission stated that those pending applicants whose applications were granted after April 3, 1997 would have the option of broadcasting either analog service or DTV on a single six-MegaHertz channel. Lodging App. L-273, ¶ 13.

Pappas petitioned for reconsideration and later supplemented its petition for reconsideration with specific evidence that a paired DTV channel in Avalon, California was available and could be awarded to it, consistent with the Commission's rules and without disturbing the Table of Channel Allotments for DTV adopted in the *Sixth Report and Order*. *See* Pappas's Supplement to Petition for Reconsideration, filed July 17, 1998 (the "Pappas Supplement"), at App. 57a .

In its *Second Memorandum and Order on Reconsideration* ("*SMOOR*"), the Commission denied Pappas's petition for reconsideration, maintaining that because parties in Pappas's situation would have the option of converting their analog station to digital, or, alternatively, building their station initially as a DTV station on the single channel, allocating a second, paired DTV channel to such parties for the transitional period was not in the public interest. Lodging App., L-322, ¶ 15. The Commission also claimed that granting an additional, paired

DTV channel would "severely limit the availability of digital channels for new entrants and other potential public interest uses," diminish competition and diversity, and cause disruption. Lodging App. L-322-23, ¶¶ 15, 18; L-326, ¶ 26. In so ruling, the Commission never considered or even acknowledged the Pappas Supplement, which contained specific evidence that a paired DTV channel could be allotted to Avalon, California, without disrupting any other aspect of the Commission's DTV conversion scheme.

Pappas and three other parties timely petitioned for review of the Commission's actions to the United States Court of Appeals for the District of Columbia Circuit.[3] In its petition for review, Pappas asserted that the Commission's blanket "issuance" of DTV licenses on April 3, 1997 violated the requirement in section 308 of the Communications Act that the Commission "may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by" the Commission, except in times of emergency. App. 30a. Pappas further asserted that the Commission's unexplained reversal of its initial determination to grant a paired DTV channel to pending applicants, and its failure to grant such a channel to Pappas in particular, was arbitrary, capricious, or otherwise not in accordance with law. App. 17a-18a.

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3. The four other parties who petitioned for review, and who prosecuted their petitions to judgment in the Court of Appeals, were: Community Television, Inc.; Pennsylvania Telecasters Association; and Minority Television Project, Inc. The following additional parties intervened in support of petitioners: Paxson Communications Corporation; Corridor Television, LLP; and Entravision Communications Company, LLC.

The Court of Appeals denied Pappas' petition. In the Court's view, the grant of paired DTV channels constituted only a "modification" of existing broadcasters' analog licenses. The Court held that the Commission could reasonably find that section 316 of the Communications Act, 47 U.S.C. § 316, permits such license modifications without submission of a written application as required by section 308. App. 15a-16a. Turning to Pappas's challenge to the Commission's failure to grant paired DTV channels to pending applicants and to Pappas in particular, the Court of Appeals held that the Commission's action was a permissible reading of Congress's directive in the 1996 Act regarding eligibility for new DTV licenses, 47 U.S.C. § 336, and it found that the Commission's failure to address Pappas's evidence of an available, noninterfering DTV channel for Avalon, California, was "harmless." App. 17a; 18a, n.9.

REASONS FOR GRANTING THE WRIT

The Commission's action purportedly to "issue" hundreds of DTV licenses on April 3, 1997 only to those persons holding analog broadcast licenses or construction permits on that date must be set aside, because it violated the written license application procedures established by Congress in the Communications Act. Moreover, in implementing this blanket license "issuance" scheme, the Commission reversed, without rational explanation, its earlier determination that persons (such as Pappas) with applications pending, but not yet granted on April 3, 1997, would also be eligible for a paired DTV channel. Finally, the Commission subsequently refused even to consider evidence that adequate spectrum exists to grant Pappas a paired DTV channel in Avalon, California that would not interfere with any other DTV allocation made by the

Commission in the proceeding. The Commission's refusal to allocate this paired DTV channel was arbitrary, capricious, or otherwise not in accordance with law. The Court of Appeals' judgment affirming the Commission's action thus should be vacated, and the matter should be remanded for further proceedings consistent with section 308 of the Communications Act, 47 U.S.C. § 308, and the requirements of due process.

I. THE COMMISSION WAS NOT ENTITLED TO ISSUE DTV LICENSES UNTIL AFTER IT HAD RECEIVED WRITTEN APPLICATIONS

"Agency power is derived from statutes." *Motion Picture Ass'n of America v. Oman*, 969 F.2d 1154, 1155 (D.C. Cir. 1992). "Regardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.' " *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1297 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

The FCC's authority to issue, modify, and renew broadcast station construction permits and station licenses is derived entirely from the Communications Act, 47 U.S.C. § 151, *et seq*. Here, by declaring, in the name of administrative convenience, that initial DTV licenses were "issued" on April 3, 1997, prior to receiving written applications for those licenses, the Commission circumvented the procedures prescribed by the statute and bypassed the safeguards established to protect the public interest. The agency's disregard for the administrative structure enacted by Congress warrants this Court's attention and correction.

A. The Written Application Requirement of Section 308 Serves Important Interests that the FCC Was Not Empowered to Ignore.

Section 308 of the Communications Act requires that, except in time of war or other circumstances not applicable here, the "Commission may grant construction permits and station licenses, or modifications or renewals thereof, *only* upon written application therefor. . . ." App. 30a (emphasis added). This written application requirement serves important public interests. It allows the Commission to determine whether the applicant is financially qualified to build and operate a broadcast station, a "fundamental" issue for the agency's determination. *See, e.g., In re Applications of Dutchess Comm. Corp., Poughkeepsie, New York, et al.*, 101 FCC 2d 243 (1985). It also provides the Commission with information and the opportunity necessary to ensure that the applicant intends to use the new license and will not simply "warehous[e]" valuable spectrum. *See, e.g., In the Matter of Advanced Comms. Corp.*, 11 F.C.C.R. 3399, ¶ 64 (1995). Furthermore, the process allows others with an "interest" in the disposition of the application — members of the community which the station is intended to serve, for example — to register protests or concerns. *See* 47 U.S.C. §§ 309(d) (authorizing protest) and 311(a) (directing applicant to publish notice of the application in the community).

In its *Fifth Report and Order*, the Commission set forth a three-step process for granting paired DTV channels to eligible broadcasters and permittees, altering the normal two-phased process, where a person first applies for and is granted a permit to construct a station, and then applies for and receives a license to broadcast. Instead, the Commission *first*

purported to "issue" DTV licenses on April 3, 1997 to all persons it deemed eligible on that date. Lodging App. L-134, ¶ 68 ("[W]e issue, by this paragraph . . . additional DTV licenses. . . ."); Lodging App. L-319, ¶ 9 ("We issued initial DTV licenses simultaneously to all eligible full service permittees and licensees on April 3, 1997."); Lodging App. L-270, ¶ 3 ("In the *Fifth Report and Order*, the Commission issued initial DTV licenses simultaneously to all eligible full-power permittees and licensees."). Only after these initial licenses were "issued" were the awardees required to apply in writing for permits to construct, test, and use their broadcast facilities. Lodging App. L-134-36, ¶¶ 68-75. This scheme to "issue" licenses prior to receiving written applications therefor flatly violated section 308(a).[4]

B. Congress Provided No Basis in the Communications Act for the Commission to Circumvent the Written Application Requirement.

The FCC advanced, and the Court of Appeals accepted, two justifications for circumventing section 308(a)'s written application requirement. First, the Commission contended that, in accordance with the principles of statutory construction set forth in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), its blanket "issuance" of the initial DTV licenses was a permissible method of implementing Congress's direction in the 1996 Act that the Commission "should limit the initial eligibility for" additional DTV licenses "to persons that, as of the date of such issuance, are licensed to operate a television broadcast

4. To reconcile the Commission's process with section 308(a), the initial DTV licenses should not have been "issued" until sometime after the Commission received and considered written applications for those licenses.

station or hold a permit to construct such a station (or both). . . ." *See* App. 15a-16a, *citing* App. 33a-34a. Second, the Commission contended that its April 3, 1997 blanket "issuance" of DTV licenses did not constitute the "grant" or "modification" of a permit or station license under section 308(a), for which a written application was required, but rather the "modification" of a station license or construction permit pursuant to section 316(a)(1) of the Communications Act, which, the Commission contended, requires no written application. *See* App. 14a-15a, *citing Peoples Broad. Co. v. United States*, 209 F.2d 286, 287 (D.C. Cir. 1953). Neither argument, upon closer scrutiny, can justify the Commission's action here.

1. Section 336 of the Communications Act Does Not Authorize the FCC to Disregard the Written Application Requirement of Section 308.

Section 336 of the Communications Act (enacted as part of the 1996 Act) states, in part, that "[i]f the Commission determines to issue additional licenses for advanced television services" it "should limit the initial eligibility for such licenses to persons that, as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct such a station (or both). . . ." App. 33a-34a. The Court of Appeals held that "[n]othing in § 336 foreclosed the FCC from issuing initial DTV licenses on a date certain." App. 16a. Moreover, because Congress "did not answer the question of how [sections 316 and 336] apply to the issuance of DTV licenses," under the principles of *Chevron*, the FCC's action in granting the DTV licenses must be upheld "so long as it is reasonable." App. 13a-14a.

The Court of Appeals is correct that section 336 did not foreclose the Commission from granting DTV licenses

"on a date certain." And section 336 is indeed silent on the question of whether written applications are required before those licenses could be granted. But another provision of the Communications Act, section 308, is *not* silent. It specifically directs that the Commission can grant a new broadcast license or modify an existing license "*only* upon written application therefor received by it. . . ." App. 30a (emphasis added). Section 336 provides absolutely no reason to conclude that Congress intended to vitiate the written application requirement of section 308, and *Chevron* does not permit the Commission to read this requirement out of the Communications Act. Such an interpretation "runs afoul of the cardinal canon of statutory construction that '[w]e must read the statutes to give effect to each if we can do so while preserving their sense and purpose.' " *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)).[5]

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5. By defining in section 336 the universe of persons eligible to receive DTV licenses, Congress did not (as suggested by the Commission below) render meaningless the written application process of section 308. App. 16a (referring to statements of FCC's counsel at oral argument). Section 336 did not direct the agency to grant DTV licenses to any particular person, much less to all who were eligible. Section 308 still mandates that written applications be received in order to determine who, among the eligible persons, should in fact receive DTV licenses.

2. The Commission Could Not Avoid Section 308's Written Application" Requirement by Styling the Issuance of DTV Licenses as Analog License "Modifications."

The Court of Appeals also accepted the FCC's contention that the purported issuance of hundreds of new "initial DTV licenses" on April 3, 1997 was not a "grant" of "station licenses, or modifications or renewals thereof," governed by section 308, but rather a "modification" of existing analog station licenses or construction permits under a different provision of the Communications Act, section 316(a). The Court of Appeals held that:

> [b]ecause the issuance of initial DTV licenses to existing broadcasters was not clearly the issuance of new "station licenses" under § 308(a) and because the terms of the DTV licenses can reasonably be considered modifications of existing licenses, the FCC could reasonably deem § 308(a) inapplicable and issue DTV licenses pursuant to § 316. App. 15a.

The flaw in this analysis is that the "written application" requirement of section 308 cannot so readily be dismissed simply by labeling the Commission's wholesale issuance of initial DTV licenses a "modification" of existing analog licenses rather than a "grant" of new licenses, because section 308 also explicitly applies to "modifications or renewals" of existing licenses. App. 30a. When faced with two potentially applicable sections, especially ones residing in the same statute, the agency and reviewing courts have an

obligation to try to harmonize those provisions, not simply ignore one in favor of the other. *See Watt v. Alaska*, *supra*.[6]

The only logical inference to be drawn from the juxtaposition of the two provisions — and one that the Court of Appeals did not even attempt to make — is that section 308 and section 316 refer to different types of "modifications." Some modifications are requested by, or benefit, licensees; others are made necessary by the public interest and may limit or materially impinge upon the scope of a license. The former require written application under section 308; the latter require written notification to the licensee under section 316.

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6. This imperative to give meaning to both sections of the Communications Act is particularly strong, because the sections share a decades-long lineage. Both sections underwent substantive amendment in 1952. In the House report accompanying the amendments (which reflects the Senate's views as well), the legislators described section 308 as "now provid[ing] that the Commission may grant licenses, renewals of licenses, *and modifications of licenses* only upon written application therefor received by it," subject to exceptions not germane here. House Rep. No. 1750, 1952 U.S. Code Cong. & Admin. News 2234, 2242 (1952) (emphasis added). The same report, discussing changes to what became section 316, notes that the amendments enacted provide that "before *an order of* modification may become final the holder of the license or permit must have been notified in writing of the proposed action" and have the opportunity to object. *Id.* at 2248 (emphasis added). Congress must have contemplated some distinction between cases where "modification" first requires that the Commission receive "written application therefor," and those where "an order of modification" may be made by the Commission, but only upon written notice to the licensee or permit holder.

The conclusion that section 316 applies only to circumstances in which the scope of a license is being limited or the licensee's interests are being adversely impacted is one that has been reached not only by a different Court of Appeals, but a different panel of the District of Columbia Circuit as well. In *California Citizens Band Ass'n v. United States*, 375 F.2d 43 (9th Cir. 1967), the United States Court of Appeals for the Ninth Circuit stated that "it is apparent from a reading of the statute [section 316] that its primary function is to protect the individual from a modification order of the Commission and is concerned with the conduct and other facts peculiar to an individual licensee." 375 F.2d at 52. Accordingly, the Ninth Circuit held that new rules for the operation of a certain class of radio station licenses were not "modifications" within the meaning of section 316. Similarly, in *Transcontinent Television Corp. v. FCC*, 308 F.2d 339, 343 (D.C. Cir. 1962), the District of Columbia Circuit held that "[w]e construe section 316(a) as having reference to a modification *which interferes with rights of a licensee* during the term of its license. . . ." 308 F.3d at 343 (emphasis added). In that case, the Commission had substituted a UHF television channel for the licensee's existing (and more valuable) VHF channel, effective upon the completion of the licensee's current license period, without providing a hearing under section 316(a). 308 F.2d at 341.

Here, to the extent that the Commission's blanket grant of "initial DTV licenses" was a "modification" at all, *see infra*, it was plainly one that greatly benefited and was enthusiastically sought by existing analog station license and permit holders. It certainly was not the type of Commission "order" from which the licensees required "protect[ion]." *California Citizens*, 375 F.2d at 52. Nor can it be said to have "interfere[d] with the rights" of the licensees. *Transcontinent*, 308 F.2d at 343. Accordingly, the Commission's action was governed here by section 308, not section 316.

Peoples Broad. Co. v. United States, 209 F.2d 286 (D.C. Cir. 1953), relied upon by the Court of Appeals, does not compel a different result. There the Court was confronted with an order by the Commission that was unwelcome to the licensee and interfered with its incumbent service. (The Commission, over the licensee's objection, had ordered the license to be shifted from channel 4 to channel 8, thereby disrupting the licensee's existing service. 209 F.2d at 287.) The Court in its decision was concerned entirely with the licensee's argument that *any* sort of modification to a license required an application from the licensee — an argument that, if accepted, would have made every "modification of licenses . . . entirely dependent upon the wishes of existing licensees," nullifying "a large part of the regulatory power of the Commission." *Id.* at 288. Moreover, it would have rendered meaningless the requirement of notice to the licensee contained in section 316, as a notice requirement makes no sense where it is the licensee itself that initiates the action by filing an application. Neither of those concerns applies here.[7]

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7. Both Congress's and the Commission's actions subsequent to the *Peoples* decision reaffirm the distinction discussed above. In 1992, Congress revisited section 308(b) (governing the procedures for submitting applications), but left intact the inclusion of "modifications" as among those Commission actions for which written application is required under section 308(a). *See* 47 U.S.C. § 308, Historical and Statutory Notes (1992 Amendments). For its part, the FCC, in its regulations, reminds parties that, pursuant to section 308, "the Commission may grant the following authorizations only upon written application received by it: station licenses, ***modifications*** of licenses, renewals of licenses; transfers and assignments of station licenses, or any right thereunder." *See, e.g.*, 47 C.F.R. §§ 24.805, 26.303 (emphasis added).

Finally, the Commission's reliance on the "modification" provisions of section 316 is misplaced because its actions here cannot reasonably be termed a "modification" of existing broadcast licenses at all. This Court recently rejected a similarly strained invocation of the term "modify" by the FCC. *MCI Telecomm. Corp. v. American Tel. & Tel.*, 512 U.S. 218 (1994). In *MCI*, this Court considered the use of the word "modify" in 47 U.S.C. § 203(b), which requires common carriers to file tariffs. *Id.* at 219. Section 203(b)(2) "authorizes the Commission to 'modify' any requirement of § 203." *Id.* Notwithstanding section 203's fundamental requirement that carriers file tariffs, the Commission chose to make tariff filing optional for all non-dominant long-distance carriers, and sought to justify its action as a "valid exercise of its modification authority." *Id.* This Court rejected that reasoning:

> The dispute between the parties turns on the meaning of the phrase "modify any requirement" in § 203(b)(2). Petitioners argue that it gives the Commission authority to make even basic and fundamental changes in the scheme created by that section. We disagree. The word "modify" . . . has a connotation of increment or limitation. Virtually every dictionary we are aware of says that "to modify" means to change moderately or in minor fashion. *Id.* at 225.

The Court proceeded to state: " 'Modify,' in our view, connotes moderate change. . . . To our knowledge all English dictionaries provide the narrow definition of 'modify. . . .' We have not the slightest doubt that is the meaning the statute intended." *Id.* at 228.

The Court of Appeals acknowledged the *MCI* decision, but accepted the Commission's contention that the "modification" here was modest in nature. The Court of Appeals characterized the Commission's issuance of "initial DTV licenses" as an "analog-to-digital transition" that "is limited to a one-time change," and held that the "FCC has not wrought a fundamental change to the terms" of the existing analog licenses and permits. App. 15a.

To characterize the issuance of the initial DTV licenses in this manner ignores the significance of the FCC's action. Transitioning the nation's television service from analog to digital, and giving existing broadcasters the ability to provide ancillary digital services simultaneously with their analog service, constitutes much more than a mere "modification" of the existing analog licenses. Use of the digital medium will allow broadcasters to compress their programming, offering not only higher-quality transmissions, but vastly greater numbers of programs as well. *Cf. McClatchy Broad. Co. v. FCC*, 239 F.2d 19, 24 (D.C. Cir. 1956) (characterizing a reduction in the size of an antenna, and a concomitant decrease in reception area, as "modifying some of the basic characteristics of a construction permit" and therefore "tantamount to the issuance of a new and different permit").[8] To dismiss this technological change as less than

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8. The Court of Appeals acknowledged that holders of a paired DTV channel will not be restricted simply to providing a duplicate, digital version of their existing analog service. As directed by Congress in section 336, the Commission is permitting the DTV licensees to "provide ancillary services as well. . . ." App. 15a. These ancillary services hold the prospect of further changing the nature of the broadcasters' relationship with their viewers by introducing voice, data, electronic commerce, and other interactive services. The

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"fundamental" is akin to labeling insignificant the change from vacuum tubes to solid state circuits. Finally, the "transition period" and "one-time change" to which the Court of Appeals referred is, in fact, scheduled to last for at least six more years — an extremely long time in the context of licenses that themselves are limited by statute to maximum terms of only eight years.[9] *See* 47 U.S.C. § 307(c).

In the final analysis, the Commission's own actions speak loudest: under the three-step procedure established for issuance of the paired DTV channels, after purportedly "issuing" the DTV licenses, the Commission still required

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Commission's action thus not only enables a transition from analog to digital, it grants two, simultaneous channels to existing licensees and permittees, allowing them to avoid having to choose between serving those viewers equipped with digital television sets or converters and those who have not yet chosen to switch from analog service. *See McClatchy*, 239 F.2d at 24 (loss of audience size a factor in the Court's conclusion that the Commission's purported modification effectively created a "new and different permit").

9. The Court of Appeals' holding that the award of a new, paired license to a different channel using a different medium is simply a "modification" of the existing analog licenses also runs counter to the statutory definition of a "license" under the Communications Act, which defines a "license" as "that instrument of authorization required . . . for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission." 47 U.S.C. § 153(42). Just as the request for an additional analog channel would have been regarded as a request for an additional license, the additional authorization to operate a digital "apparatus" on a different frequency can only be understood as a "license" in its own right. *See also* 47 C.F.R. § 73.3572 (identifying, *inter alia*, a change in frequency as a "major" change).

broadcasters to *apply* for a permit to construct, and then a license to operate, a DTV station. Lodging App. L-134-136, ¶¶ 68-75. Moreover, the Commission actually issued new written DTV license documents to eligible broadcasters requiring that one of the two issued licenses be physically "surrendered" at the end of the transition period. Lodging App. L-134, ¶ 69. If the Commission were indeed merely "modifying" existing analog broadcast licenses under section 316, and if, as the Commission now contends, no written application for such modification were required, then why did the Commission require that written applications be made and issue new written licenses in response to those applications? The answer, of course, is that, notwithstanding the Commission's characterization of its action as a wholesale "modification" of existing analog broadcast licenses, the agency recognized that its actions required the submission of written applications in accordance with section 308 of the Communications Act. This Court can and should grant the petition to correct the agency's failure to adhere to the requirements of the statute.

II. THE COMMISSION'S REFUSAL TO GRANT A PAIRED DIGITAL CHANNEL TO PAPPAS FAILED TO MEET THE STANDARDS OF REASONED AGENCY DECISIONMAKING

When exercising its rulemaking authority, the FCC, like all federal agencies, must refrain from making decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 5 U.S.C. § 706(2)(A). Indeed, Congress has mandated that the FCC provide "a fair, efficient, and equitable distribution of radio service among the several States and communities. . . ." 47 U.S.C. § 307(b). In first reversing, without reasoned explanation, its earlier

determination to allocate a paired digital channel to construction permit applicants (such as Pappas) whose applications were pending on October 24, 1991, and then summarily rejecting Pappas's evidence that such a channel was available in Avalon, California and could be allotted without interference, the FCC violated those bedrock standards.

A. The Commission Failed to Provide Any Explanation, Much Less a "Reasoned Analysis," for Reversing Its Interpretation of the 1996 Act to Exclude Pending Applicants from Initial Eligibility for a Paired DTV Channel.

As noted above, in its *Fifth Report and Order* adopted on April 3, 1997, the Commission excluded from the allocation of paired DTV channels those applicants for a broadcast station construction permit (the "pending applicants") whose applications were pending on October 24, 1991, but not granted as of April 3, 1997, the Commission's constructive "issue date" for DTV licenses. The Commission cited section 336 as the justification for this exclusion,[10] declaring that, "given Congress' explicit

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10. As noted above, section 336 provides, in pertinent part,

> If the Commission determines to issue additional licenses for advanced television services, the Commission — (1) should limit the initial eligibility for such licenses to persons that, as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct such a station (or both). . . . App. 33a-34a.

direction, there is now no statutory basis to question the Commission's authority to limit initial eligibility [for paired DTV channels] to existing broadcasters." Lodging App. L-111, ¶ 17.

What the Commission failed to acknowledge is that this exclusion of the pending applicants from initial eligibility for paired DTV licenses represented a flat reversal of the position taken by the Commission in its *Sixth Further Notice*, adopted on July 25, 1996 (only eight months prior to the *Fifth Report and Order*), where the Commission had declared that "existing broadcasters eligible for a DTV channel will include . . . all parties with applications for a construction permit on file as of October 24, 1991, who are ultimately awarded full-service broadcast station licenses [*i.e.*, the pending applicants]." Lodging App. L-6 - L-7, ¶ 10. And what of section 336, which had been enacted in February 1996, some five months *before* adoption of the *Sixth Further Notice*? The Commission stated that "[o]ur proposals herein regarding full accommodation are also consistent with the provisions of the 1996 Telecommunications Act regarding initial eligibility for licenses." Lodging App. L-7. ¶ 10.

Thus, within an eight-month period, the Commission relied upon the same statutory provision first to include, and then to exclude, the pending applicants from eligibility for the DTV channels. While an agency might be entitled to change its interpretation of the statute it administers and to rescind a finding earlier rendered based upon that statute, it must at least acknowledge that it is doing so and provide a "reasoned analysis" in the process. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). Here, the Commission did neither, and this Court accordingly should remand this matter with instructions that the agency adequately explain its actions.

B. The Commission's Explanation for Refusing to Allocate a Paired DTV channel to Pappas Did Not Constitute a "Rational Connection Between the Facts Found and the Choice Made."

Upon reconsideration of the *Fifth Report and Order* and the corresponding channel allocations made in the *Sixth Report and Order*, the Commission rejected objections raised by a number of pending applicants, including Pappas, to the Commission's decision to exclude them from the allotment of a second, paired DTV channel, stating:

> We do not believe that granting a second, paired channel to the pending applicants for use in the conversion would be an efficient use of the scarce spectrum. . . . [A]llotting second channels to the pending applicants could diminish competition and diversity by appropriating scarce spectrum that could otherwise be used by new entrants into broadcasting. . . . In addition, affording second channels to all the pending applicants as their NTSC applications are granted would likely be impossible. There are few available channels for the many pending broadcast applications, particularly in urbanized areas such as the Northeast. While the petitioners request that we grant such second channels to the pending applicants on a case-by-case basis, to do so might create inequitable distinctions among the pending applicants. Lodging App. L-322-323, ¶¶ 15, 18-19.

The problem with this purported justification for denial is that it proves too much. The Commission not only refused to reconsider its categorical decision to deny all pending

applicants a paired DTV channel, it refused even to consider the petitions of individual pending applicants on a case-by-case basis.[11] As noted below, well in advance of the Commission's adoption of the *SMOOR*, Pappas had submitted evidence to the Commission that a paired DTV channel falling within the so-called "core spectrum" for television broadcasting service (Channel 29) was available and could be paired with Pappas's existing analog channel allotment (Channel 54) without disrupting any of the other DTV allotments made by the Commission. App. 57a. The availability of a noninterfering paired DTV channel placed Pappas in a unique position among even the select group of pending applicants; accordingly, the Commission's generalized assertions — that allocation of a paired DTV channel would constitute an "inefficient use" of spectrum, would diminish competition and diversity and would "likely be impossible" — simply do not apply in Pappas's case. Because the Commission "entirely failed to consider an important aspect of the problem," and "offered an explanation for its decision that runs counter to the evidence before the agency," its blanket rejection of Pappas's application for a paired DTV channel is arbitrary and capricious, and should be set aside. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

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11. Referring to Pappas's request for reconsideration, the Commission offered no specifics, stating only that "pre-1991 applicants were last in priority among those on the priority list for digital channels," and that it was granting the pending applicants a single channel with the option of broadcasting either an analog or a digital signal (precluding those broadcasters from transitioning their viewers from analog to digital service over time, the primary objective of awarding eligible broadcasters two channels in the first place). Lodging App. L-326, ¶ 26. The Commission closed its reconsideration of the pending applicants' claims thusly: "After consideration of the equities present, including the disruption that could be caused if we were to attempt to find paired channels for all of the applicants in this category, we conclude that we should not grant the requested relief." *Id.*

C. At a Minimum, This Court Should Grant the Petition, Vacate the Judgment and Remand the Matter, Because the Commission Wrongfully Refused Even to Consider the Evidence Presented by Pappas of an Available, Noninterfering Paired DTV Channel in Avalon, California, That Would Not Disrupt the Table of Allotments Established by the Commission.

In its brief below, the Commission admitted that it did not accept and never considered Pappas's supplemental filing identifying the availability of DTV Channel 29 as an appropriate paired DTV channel for Pappas's current allotment of analog Channel 54, labeling such supplemental filing "untimely." *Brief for Respondents Federal Communications Commission* (November 22, 1999) at 44-45, n.19. The Commission was wrong to refuse consideration of Pappas's supplement, which was appropriately filed with an accompanying (and unopposed) motion for leave to file, as required by 47 C.F.R. § 1.429(d), more than four months before the Commission adopted the *SMOOR*. App. 51a. As the Court of Appeals held on another occasion in which the FCC attempted summarily to dismiss a petitioner's well-supported application for particularized treatment:

> [A] general rule, deemed valid because its overall objectives are in the public interest, may not be in the "public interest" if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest. An agency need not sift pleadings and documents to identify such applications, but allegations such as those made by petitioners, stated with clarity and

> accompanied by supporting data, are not subject to perfunctory treatment, but must be given a "hard look." *Wait Radio v. F.C.C.*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (Leventhal, J.).

Here, Pappas submitted a supplemental filing, accompanied by an uncontroverted engineering statement demonstrating that DTV Channel 29 could be allotted to Pappas in Avalon, California "with no adverse impact on any television station, based on the Commission's standards." App. 60a. This supplemental filing was duly accompanied by a motion for leave to file the engineering statement advising that the supplement provides information "materially beneficial to the Commission" in considering Pappas's petition. App. 53a.

The Commission not only failed to give this evidence a "hard look," it never even bothered to act on Pappas's motion for leave. It was only in the Commission's brief below that its counsel claimed Pappas's evidence "was never accepted and was not considered" by the Commission in its deliberations. *Brief for Respondents Federal Communications Commission* (November 22, 1999) at 44-45, n.19. The Commission, however, never provided any explanation for its failure to consider Pappas's evidence. Statements by the Commission's appellate counsel, in its brief below, cannot substitute for proper agency action. "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n, supra*, 463 U.S. at 50. *See also Wait Radio*, 418 F.2d at 1158 ("It may be that points raised on appeal by Commission counsel would support its order if they had been set forth by the agency, but argument by counsel cannot take the place of an agency's statement of reasons or findings.").

For its part, the Court of Appeals declared in this case that the Commission's lack of explanation was "harmless." App. 18a, n.9. It was not. The Commission had before it specific evidence that a paired DTV channel could be awarded to Pappas without interfering with or otherwise undermining the Commission's proceedings or altering its DTV Table of Channel Allotments. This evidence ran directly counter to the Commission's blanket assertions in the *SMOOR* that an award of a paired DTV channel to a pending applicant such as Pappas would be inefficient, would create "inequitable distinctions," or would otherwise disrupt the transition to DTV. Lodging App. L-322-23, ¶¶ 15, 18; L-326, ¶ 26.

Because by ignoring Pappas's evidence the Commission "entirely failed to consider an important aspect of the problem" and "offered an explanation for its decision that runs counter to the evidence before the agency," its denial of a paired DTV channel to Pappas in the proceedings below was arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. At a minimum, therefore, this Court should grant the petition, vacate the Court of Appeals' judgment, and remand with instructions that the matter be returned to the Commission for consideration of Pappas's supplemental evidence.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted so that this Court can provide proper effect to section 308 of the Communications Act. In the alternative, the petition should be granted, the judgment vacated, and the matter remanded for further consideration of Pappas's evidence of the availability of a noninterfering paired DTV channel to Avalon, California.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED, DECIDED AND FILED JULY 7, 2000

United States Court of Appeals,
District of Columbia Circuit.

COMMUNITY TELEVISION, INC., et al.,

Appellant/Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee/Respondent.

Paxson Communications Corporation, et al.,

Intervenors.

Association for Maximum Service Television, Inc., et al.,

Intervenor.

Nos. 98-1106, 98-1212, 98-1259 & 99-1082.

Argued March 27, 2000.
Decided July 7, 2000.

* * *

Appendix A

Appeals and Petitions for Review of Orders of the Federal Communications Commission.

* * *

Before: EDWARDS, Chief Judge, HENDERSON and ROGERS, Circuit Judges.

Opinion for the Court filed by Circuit Judge ROGERS.

ROGERS, Circuit Judge:

Petitioners and intervenors[1] seek review of the Federal Communications Commission's final rules establishing the procedures and timetable under which television broadcasting will migrate from the now-prevalent analog

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1. Petitioners in these consolidated cases are Community Television, Inc., Pappas Telecasting of Southern California, LLC, Pennsylvania Telecasters Association, and Minority Television Project, Inc. Intervenors in support of petitioners are Paxson Communications Corporation, Corridor Television, LLP, and Entravision Communications Company, LLC. For ease of reference we refer to these parties as "petitioners" except as indicated. Certain other broadcasters withdrew their petitions or the court dismissed their challenges, see, e.g., Lindsay Television, Inc. v. Association of America's Pub. Television Stations, 1998 WL 633809 (D.C.Cir. Aug.11, 1998), including Mountain Broadcasting Corporation, which voluntarily withdrew its petition for review after filing its opening brief in light of the FCC's decision to allow it to trade DTV channels with another station. See Public Notice, Broadcast Actions, Report No. 44600, 1999 WL 979570 (Oct. 27, 1999). Separately, the Association for Maximum Service Television, Inc. intervened in support of the FCC.

technology to digital technology. Digital technology holds the promise of either greatly enhancing the audiovisual quality of television broadcasts or of replicating current quality while liberating substantial portions of the broadcast spectrum for other uses. Because of the massive investment required by broadcasters and consumers, who must purchase digital televisions or converter devices, to accomplish the analog-to-digital transition, the rules under review provide for a ten-year transition period during which licensed broadcasters and those with permits to construct broadcast facilities as of April 3, 1997, have received an additional channel to commence digital broadcasting while continuing analog broadcasts during the transition. At the end of the transition period, analog transmissions will cease; broadcasters will retain their new digital channels and give back to the FCC their analog channels. Thus by statute, essentially all television broadcasting in the United States will be exclusively by digital technology as of December 31, 2006. See 47 U.S.C. § 309(j)(14)(A)-(B).

To plan for the transition, the FCC indisputably faced myriad policy choices and a daunting engineering task. Given the complexity and interdependence of the decisions the FCC had to make, the trade-offs among competing interests would be unlikely to satisfy all broadcasters and consumers. Remarkably then, only a few broadcasters, four petitioners supported by three intervenors, challenge the final rules now. They contend that the FCC acted unlawfully by: (1) granting a second channel to broadcasters whose construction permit applications had been approved by April 3, 1997, while denying a second channel to those whose applications had not been so approved; (2) allotting that second channel to

replicate the area served as of April 3, 1997, even if the broadcaster had applied to expand the service area as of that date; (3) adopting and applying its "service replication" principle in a way that unfairly favored VHF broadcasters over UHF broadcasters; and (4) deleting Channel 29 in State College, Pennsylvania and redistributing that spectrum where a would-be broadcaster had sought to apply to operate Channel 29. While petitioners' challenges may be sympathetic, we conclude that the FCC's decisions were neither arbitrary, capricious, nor contrary to law, and accordingly, we deny the petitions for review.

I.

From its inception, the television broadcasting industry has relied on a common set of technical standards to maximize the availability of television. When the FCC made its first allotment of spectrum for broadcast television in 1941, it also adopted the basic engineering standards devised by the National Television System Committee for monochromatic (black-and-white) television service.[2] See Notice of Inquiry, In the Matter of Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, 2 F.C.C.R. 5125, 5126, 1987 WL 344812 (1987). That standard, commonly referred to as NTSC, was revised in 1953 to allow for color television broadcasting, and again in 1984 to allow for broadcasts using stereophonic

2. These standards include the width of the television broadcast channel, the precise frequencies for the visual and aural carriers, the number of lines per frame, the scanning rate and method, the aspect ratio or width-to-height ratio of the picture, and the audio mode.

sound. Id. Relying on the NTSC standard, the FCC maintains the Television Table of Allotments, 47 C.F.R. § 73.606, which is the master plan for allocating NTSC television broadcast channels to communities throughout the country. See WITN-TV v. FCC, 849 F.2d 1521, 1522-23 (D.C.Cir. 1988). The Table of Allotments designates how many full service, low power, and television translator channels are assigned to each community, see 47 C.F.R. §§ 73.601, 73.606, and these designations distinguish between VHF ("very high frequency") Channels 2-13 and UHF ("ultra high frequency") Channels 14-69.

Although the NTSC standard proved to be workable for more than fifty years, in light of the development of new broadcasting technologies, the emergence of competing standards, and the growing popularity of cable television, members of the television broadcasting industry petitioned for a rulemaking in 1987 for the adoption of a new and improved standard for provision of "advanced" television, or "ATV".[3] The FCC obliged. See Notice of Inquiry, 2 F.C.C.R. 5125. The development of the rules under review illustrates the difficult policy issues and complex engineering challenges faced by the FCC. At the outset of the rulemaking proceeding, the FCC ordered a freeze on any amendments to the Television Table of Allotments and on all applications for construction permits for vacant television channels in the thirty busiest television markets in order to preserve its options for reallocating spectrum should that become

3. The FCC adopted the term "ATV" to describe a variety of competing technologies, each of which would improve upon NTSC service. See Notice of Proposed Rulemaking, 6 F.C.C.R. 7024, 7024 n. 1, 1991 WL 693244 (1991).

necessary. See Advanced Television Systems, 776 Rad. Reg.2d (P&F) 843 (1987) ("Freeze Order"). By 1991, the FCC tentatively opined, and ultimately decided that: migration to a new standard would be in the public interest; the transition to a digital standard would not involve rededication of broadcast spectrum; incumbent broadcasters would be the parties best suited to implement the transition to a digital standard; a transition period during which NTSC broadcasts would continue would be necessary; and the width of a digital channel would not exceed the NTSC-standard width of 6 MHz. Notice of Proposed Rulemaking, 6 F.C.C.R. at 7024 ("NPRM"). To carry out these policies, the FCC proposed to pair DTV channels with analog licenses, providing incumbent broadcasters with a second 6 MHz channel for digital broadcasts (a "DTV channel") without charge for use during the transition period to allow for both digital and NTSC broadcasts. Id. at 7025-26. In the period between the initial NPRM in 1991 and 1996, following a series of reports and orders and further notices of proposed rulemaking, the FCC's transition plan had been substantially developed.

Then, in 1996, Congress enacted the Telecommunications Act of 1996, Pub.L. No. 101-104, 110 Stat. 56 (1996) ("1996 Act"), preempting to a limited degree some FCC decisions related to the analog-to-digital transition. Thereafter the relevant decisions by the FCC occurred as follows: On July 25, 1996, the FCC adopted its Sixth Further Notice of Proposed Rulemaking, 11 F.C.C.R. 10968, 1996 WL 465110 (1996), in which it set forth the proposed DTV Table of Allotments showing which broadcasters would

receive which DTV channels.[4] Then, on April 3, 1997, the FCC adopted two reports and orders that are directly at issue. In the Fifth Report and Order, 12 F.C.C.R. 12809, 1997 WL 193828 (1997), the FCC issued initial DTV licenses to incumbent broadcasters and set forth the timetable and terms under which the transition to DTV would take place. In the Sixth Report and Order, 12 F.C.C.R. 14588, 1997 WL 197153 (1997), the FCC promulgated the final DTV Table and set forth its rationale for the decisions reflected therein. In response to petitions for reconsideration, the FCC reaffirmed, clarified, and, in some measure, revised its decisions in two rounds. See Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order ("Service Reconsideration"), 13 F.C.C.R. 6860, 1998 WL 72373 (1998); Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order ("Allotment Reconsideration"), 13 F.C.C.R. 7418, 1998 WL 72379 (1998); Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders ("SMOOR"), 14 F.C.C.R. 1348, 1998 WL 879835 (1998).

In Part II of this opinion we address whether the FCC was statutorily barred from issuing DTV licenses in the Fifth Report and Order, and if not, whether the FCC arbitrarily failed to grant a second DTV channel to Pappas Telecasting of Southern California, Entravision Communications Company, Corridor Television, and Paxson Communications

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4. On December 27, 1996, the FCC released its Fourth Report and Order, 11 F.C.C.R. 17771, 1996 WL 741383 (1996), which adopted a technical DTV standard. Petitioners do not challenge the decisions reflected therein.

Corporation. In Part III we address whether the FCC arbitrarily decided not to upgrade the service area covered by the DTV allotments for Community Television, Inc. and Paxson Communications Corporation. In Part IV we address whether the FCC arbitrarily deviated from its service-replication policy when assigning Minority Television Project, Inc.'s digital allotment. And, in Part V we address whether the FCC abused its discretion in eliminating Channel 29 and reassigning its spectrum when the Pennsylvania Telecasters Association sought to apply for a construction permit for the channel and its petition to waive the Freeze Order was pending.

II.

Pappas Telecasting of Southern California, Corridor Television, Paxson Communications Corporation, and Entravision Communications Company (collectively "the pending applicants") contend that the FCC unlawfully deprived them of a second channel for digital broadcasting during the transition period. The FCC's licensing scheme for NTSC channels has two stages. See Service Reconsideration, 13 F.C.C.R. at 6862 & n. 7. A potential broadcaster first applies for a permit to construct a television station, and, if the permit is granted, the permittee then applies for a broadcast license. Id. The FCC proposed to provide a DTV channel to all parties that held a broadcast license, a construction permit, or had applied for a construction permit as of the October 24, 1991, adoption of the NPRM. See Second Report/Further Notice, 7 F.C.C.R. 3340, 3342-44, 1992 WL 690770 (1992). In the event of a "spectrum shortfall" in some communities, licensees and

permittees would receive preference. Id.; see also Third Report/ Further Notice, 7 F.C.C.R. 6924, 6928, 1992 WL 691027 (1992). Pappas and Corridor had both applied for construction permits by October 24, 1991, and were thus, at the time, in the pool of broadcasters eligible for a second channel.

However, during the rulemaking, Congress passed the 1996 Act, which addressed the issue of eligibility for additional television broadcast spectrum in the following terms:

> If the Commission determines to issue additional licenses for advanced television services, the Commission — (1) should limit the initial eligibility for such licenses to persons that, as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct such a station (or both); and (2) shall adopt regulations that allow the holders of such licenses to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity.

47 U.S.C. § 336(a).

In the Fifth Report and Order, the FCC announced that, pursuant to § 336(a)(1), it had limited initial eligibility for a DTV channel to existing licensees and permittees as of April 3, 1997. 12 F.C.C.R. at 12814-15. The Fifth Report and Order also "modified" the licenses or permits of eligible

broadcasters to grant them an "additional" license for use of a DTV channel, subject to the conditions set forth therein. Id. at 12838. The FCC embodied its grant of these DTV licenses in its final DTV Table of Allotments. See Sixth Report and Order, 12 F.C.C.R. at 14693, app. B. Recognizing that the final allocation excluded some broadcasters who had been considered eligible for a DTV channel prior to the 1996 Act, the FCC stated that it would "give particular consideration for assigning temporary DTV channels to new licensees who applied on or before October 24, 1991, given the reliance that these parties may have placed on rules we adopted before passage of the 1996 Act." Fifth Report and Order, 12 F.C.C.R. at 12816a n. 26.

In its second opinion on reconsideration of the Fifth and Sixth Reports (SMOOR), the FCC denied requests for paired channels by those permittees and licensees whose applications had been pending as of October 24, 1991, but were not granted until after April 3, 1997. While noting its stated intent in the Fifth Report and Order to give "particular consideration" to such applicants, the FCC pointed out that it had also notified them of their low priority should there be insufficient spectrum available for DTV channels. SMOOR, 14 F.C.C.R. at 1358-60 & n. 36. The FCC also noted that, in reconsidering the Fifth Report (Service Reconsideration), it had granted such applicants authority either to construct DTV stations on their NTSC channels immediately, or to convert to DTV service later, and had streamlined the application process for such analog-to-digital modification. Id. at 1359-60 (citing Service Reconsideration, 13 F.C.C.R. at 6864-66).

Appendix A

A. § 308(a)'s Written-Application Requirement. Having been deprived of "initial eligibility" for a DTV allotment by the 1996 Act, the pending applicants first raise a statutory challenge that, if successful, would invalidate the FCC's entire DTV licensing scheme. In the Fifth Report and Order, the FCC set forth a three-stage process by which it first determined that all existing broadcasters and permittees as of April 3, 1997, were granted a digital license to broadcast on an additional channel. 12 F.C.C.R. at 12838-40.[5] The FCC then established a procedure by which licensees and permittees would apply to construct facilities for digital transmission and then apply to test and use those facilities. Id. at 12840-48. Although the FCC stated in the Fifth Report and Order that it was "issu[ing]" DTV licenses, it at the same time clarified that the licenses "issued" in fact were modifications of existing analog television permits or licenses. Id. at 12838.

The pending applicants contend that the FCC's "issuance" of these DTV licenses contravened § 308(a), which provides in part that the FCC "may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it," subject to exceptions in times of emergency. 47 U.S.C. § 308(a). They maintain that the Communications Act required each incumbent broadcaster to file a written application for an initial DTV license with the FCC. The second and third stages of the process outlined in the Fifth

5. The three stages are (1) the initial modified license for DTV, (2) certification or application for a construction permit, and (3) application for a license to cover a construction permit for a DTV facility. Id.

Report and Order each require a written application. In the pending applicants' view, the FCC did not comply with § 308(a) until it issued DTV licenses pursuant to the third stage of the process set forth in the Fifth Report and Order. Thus, they continue, the first such license was issued on February 5, 1999, and that date should be used for determining "initial eligibility" under § 336(a)(1). Using this calculus, the pending applicants deem themselves initially eligible for a DTV channel because all of their respective NTSC construction permits had been granted prior to February 1999.

As an initial matter, the FCC contends that this challenge was not raised below and thus is not subject to review. Although it appears that no petitioner directed the FCC's attention specifically to § 308(a) during the rulemaking, comments by another party to that proceeding provided the FCC with a sufficient opportunity to consider the issue such that judicial review is proper. See 47 U.S.C. § 405(a). Specifically, the pending applicants rely on the comments of the Media Access Project ("MAP"), that because DTV licenses would be new licenses, the FCC was statutorily required by 47 U.S.C. § 308(b) to determine that each broadcaster receiving such a license was financially qualified. MAP's comments logically implicated § 308(a)'s written application requirement because they were directed to the contents of such applications.

On the merits, the court reviews the FCC's interpretation of the Communications Act under the now-familiar standard set forth in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843, 104 S.Ct.

2778, 81 L.Ed.2d 694 (1984), by which the court considers "whether Congress has directly spoken to the precise question at issue," id. at 842, 104 S.Ct. 2778, and if it has not, "whether the agency's answer is based on a permissible construction of the statute." Id. at 843, 104 S.Ct. 2778. We do not agree that the plain language of § 308(a) compels the crimped reading advocated by the pending applicants. Because the recipients of the initial DTV licenses were broadcasters with written applications already on file, § 308(a) must be read in conjunction with 47 U.S.C. § 316, which allows the FCC to modify existing licenses,[6] and new § 336, added by the 1996 Act, which directed the FCC to limit initial eligibility for DTV licenses to incumbent broadcasters (or those holding construction permits for a television broadcast facility). Because Congress did not answer the question of how these provisions apply to the issuance of DTV licenses, we will

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6. Section 316(a)(1) provides:

> Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification; except that, where safety of life or property is involved, the Commission may by order provide, for a shorter period of notice.

uphold the FCC's harmonization of the relevant provisions so long as it is reasonable.

In concluding that the FCC's interpretation of its modification authority was reasonable, we are instructed by the court's previous reconciliation of the apparent conflict between § 308(a) and § 316(a)(1), in holding that "[t]he Commission has power under Section 316(a) . . . to modify a license without an application for the modification having been made by the licensee." Peoples Broadcasting Co. v. United States, 209 F.2d 286, 287 (D.C.Cir.1953). While in Peoples Broadcasting, the court affirmed the FCC's power to modify a broadcaster's license by requiring it to shift from Channel 4 to Channel 8, nothing in the statute or that opinion suggests that the FCC's modification power is limited to individual licenses. Rather, the FCC may modify entire classes of licenses. Further, the issuance of transitory DTV licenses in the Fifth Report and Order was part of a process that modifies broadcasters' underlying permits and licenses in a way analogous to the modification upheld in Peoples Broadcasting: at the end of the transition period, broadcasters will have migrated from one channel to another. While there admittedly is a difference in kind from the circumstances in Peoples Broadcasting, the analog-to-digital transition is limited to a one-time change.

Hence, what the FCC did in the Fifth Report and Order is unlike the situation in MCI Telecommunications Corp. v. AT&T, 512 U.S. 218, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994), on which the pending applicants rely. There the Supreme Court held that the FCC's power to "modify" the requirements of 47 U.S.C. § 203, under which

telecommunications carriers file their rates in a tariff with the FCC, did not authorize the FCC to do away with tariffs altogether, and that no deference was due to an interpretation that went beyond the meaning that the statute could bear. Id. at 229, 114 S.Ct. 2223.[7] While the pending applicants contend that the same reasoning applies here because the FCC's issuance of an initial DTV license cannot reasonably be said to modify a broadcaster's existing license, the FCC has not wrought a fundamental change to the terms of those permits and licenses. Broadcasters will begin and end the transition period broadcasting television programming to the public under very similar terms. Although the FCC chose not to require 100% simulcasting on the NTSC and DTV channels throughout the transition, and Congress disfavored such an approach, see 47 U.S.C. § 336(a)(2), broadcasters will provide essentially the same services, with some flexibility to provide ancillary services as well, under their licenses during the transition. See Service Reconsideration, 13 F.C.C.R. at 6873-74. Because the issuance of initial DTV licenses to existing broadcasters was not clearly the issuance of new "station licenses" under § 308(a) and because the terms of the DTV licenses can reasonably be considered modifications of existing licenses, the FCC could reasonably deem § 308(a) inapplicable and issue DTV licenses pursuant to § 316.

Finally, the FCC reasonably construed § 336 to allow for the three-stage process set forth in the Fifth Report and Order. In the 1996 Act, Congress preempted the ongoing DTV proceeding only to a limited degree. Section 336

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7. Subsequently, Congress authorized detariffing. See MCI WorldCom Inc. v. FCC, 209 F.3d 760 (D.C.Cir.2000).

overruled the FCC's decision to include applicants for construction permits in the pool of broadcasters eligible for a second channel during the transition period. In most other respects, Congress left the details of managing the analog-to-digital transition to the FCC. Nothing in § 336 foreclosed the FCC from issuing initial DTV licenses on a date certain. Moreover, because Congress limited initial eligibility for DTV licenses to incumbent broadcasters, the FCC could reasonably construe § 336(a)(1)'s reference to "additional licenses for advanced television services" to encompass a modification of existing licenses and permits to allow for advanced television services in addition to then-existing analog broadcasting services. Having adopted a paired channel approach, giving a DTV license to the eligible broadcasters, the FCC's interpretation of its modification power reasonably followed. For as the FCC explained at oral argument, the two reasons for requiring the filing of an application for a new license — to determine who is eligible and how to award licenses in a competitive proceeding — are inapplicable here: Congress has defined who is eligible and there is to be no competition.

For these reasons we conclude that in the Fifth Report and Order the FCC reasonably construed the Communications Act to allow it to modify existing broadcast licenses and construction permits to render incumbent broadcasters initially eligible to provide DTV services consistent with § 336(a) and pursuant to § 316(a)(1) without having received written applications for "station licenses" covered by § 308(a).

B. The April 3, 1997, Cut-Off for DTV Eligibility. In the alternative, the pending applicants contend that even if the FCC had authority to issue initial DTV licenses in the Fifth Report and Order without having received written applications, the FCC unreasonably interpreted § 336 as requiring it to issue DTV licenses to those eligible under § 336(a)(1) as of a single date rather than account for those with equities on their side, such as Pappas Telecasting of Southern California and Corridor Television who had been eligible for a second channel prior to the 1996 Act. Further, they contend that the FCC failed to adequately explain why it chose not to grant them a second channel.

Our review is limited to whether the FCC acted reasonably and adequately explained its decision not to grant the pending applicants a second channel for the transition period. It clearly did. The FCC left no mystery as to its rationale. Notwithstanding the pending applicants' equitable arguments arising out of their disappointment resulting from the 1996 Act, the FCC decided that the spectrum that they sought would be put to better use by providing it to new full power broadcasters as well as new and displaced low power television (LPTV) and TV translator stations. See SMOOR, 14 F.C.C.R. at 1359-60. The pending applicants have not shown, in light of § 336, that the date-certain approach was "patently unreasonable, having no relationship to the underlying regulatory problem." Home Box Office, Inc. v. FCC, 567 F.2d 9, 60 (D.C.Cir.1977); see also Cassell v. FCC, 154 F.3d 478, 485 (D.C.Cir.1998). Moreover, the FCC adequately addressed the equitable concerns of those applicants who were granted construction permits after April 3, 1997, by allowing them to convert to DTV on the channel

they are granted and to apply to maximize their service area. See Service Reconsideration, 13 F.C.C.R. at 6863-66.[8] As to the substance of the FCC's rationale, it is hardly arbitrary and capricious. The agency reasonably balanced competing demands for spectrum and allowed the pending applicants considerable flexibility in making the transition to DTV.[9]

III.

Community Television, Inc. ("Community") and Paxson Communications Corporation ("Paxson"), each received

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8. The FCC's reference in the Fifth Report and Order to "particular consideration" for those in the pending applicants' position did not guarantee any particular result, and certainly did not obligate the FCC to take steps beyond the careful balancing of interests reflected in its decision to deny paired channels while increasing flexibility for analog-to-digital conversions for those in the pending applicants' position.

9. Pappas contends further that the FCC arbitrarily failed to consider its unique circumstances in that it had applied for a construction permit prior to October 24, 1991 and had presented the FCC with a motion for leave to supplement its reconsideration petition to show that a DTV channel was available in its community of Avalon, California. The FCC did not grant Pappas' motion for leave and was therefore not obliged to consider its supplement. See 47 C.F.R. § 1.429(d). To the extent that the FCC was obliged to articulate its reasons for not granting leave, its failure to do so was harmless. See 5 U.S.C. § 706. In rejecting a very similar contention raised by another party, the FCC made clear that the availability of another channel was immaterial to its discretionary decision not to award a DTV channel to petitioners. See SMOOR 14 F.C.C.R. at 1358-59.

a second channel but contend that their allotment was inadequate because it does not serve the upgraded service area for which each had applied. As a matter of policy, the FCC decided that it would allot DTV channels in a manner to replicate a broadcaster's existing NTSC service area. See Sixth Further Notice, 11 F.C.C.R. at 10974-75. In the Sixth Further Notice, the FCC indicated that "we are proposing to allow stations to maximize or increase their service area where such an increase would not create additional interference," id. at 10975; however, the FCC cautioned that allowing such modifications would affect the DTV Table, causing both technical difficulties and affecting the ability of broadcasters to comment meaningfully on the draft DTV Table. Id. at 10993.

To balance broadcasters' individual interests in increasing their service areas against the broader interests in establishing a workable DTV Table, the FCC announced in the Sixth Further Notice that it would "henceforth condition the grant of applications for modifications of technical facilities, including those for applications on file before the date of the adoption of this Further Notice but granted after that date, on the outcome of our final decision on the DTV Table of Allotments." Id. Commenters complained that those broadcasters who had applied to upgrade their service prior to July 25, 1996, the date of issuance of the Sixth Further Notice, did so with the expectation that they would receive corresponding digital upgrades and that it would be economically infeasible to invest in an upgrade of analog service only for the transition period.

The FCC partially accommodated such broadcasters. The final DTV Table, issued in the Sixth Report and Order, reflected NTSC upgrades that had been granted in the interim between the Sixth Further Notice and the Sixth Report and Order, that is, between July 25, 1996 and April 3, 1997. Applications that had not been acted upon as of April 3, 1997, remained subject to the condition of non-interference with the DTV Table, and, if granted, would not include a corresponding digital upgrade. See SMOOR, 14 F.C.C.R. at 1362-63. Community is licensed to operate Channel 57 in Atlanta, Georgia and had applied to upgrade its NTSC service area prior to the adoption of the Sixth Further Notice on July 25, 1996. Because the FCC did not grant Community's application until May 1999, Community's DTV channel, Channel 41, does not replicate its upgraded NTSC service area. Similarly, Paxson had filed eleven upgrade applications prior to July 25, 1996, each of which was granted after April 3, 1997, and therefore did not include a corresponding digital upgrade. Each party may, however, apply for such a digital upgrade. See 47 C.F.R. § 73.622, 73.623.

Community and Paxson first contend that the FCC's actions were impermissibly retroactive by subjecting pending upgrade applications to the compatibility principle. However, the mere filing of upgrade applications did not vest petitioners with a legally cognizable expectation interest. See Chadmoore Comm., Inc. v. FCC, 113 F.3d 235, 240-41 (D.C.Cir.1997). Thus the FCC was free to alter its criteria for considering those applications. Next, Community and Paxson contend, in essence, that the FCC did not try hard enough to accommodate pending applications during the course of assembling the DTV Table of Allotments. Neither

party has demonstrated that the FCC's failure to fashion the DTV Table in a manner that would have granted all upgrade applications pending on July 25, 1996, was a product of administrative whim or sloth. On the contrary, the FCC found that it was not feasible to grant all of the NTSC modification applications. SMOOR, 14 F.C.C.R. at 1362.

Paxson contends, however, that it is unable to demonstrate that the FCC acted arbitrarily because the FCC failed to explain why some upgrade applications were granted while others were not. It continues, the FCC cannot reasonably defend its decision to treat those broadcasters whose upgrade applications were granted after April 3, 1997, differently than those whose applications were granted before that date without explaining how it decided which applications to grant on which dates. But the FCC explained that it granted those applications that were consistent with the DTV Table and deferred action on those that were not. We presume that the FCC processed the pending applications with administrative regularity, for neither Community nor Paxson has identified any evidence that rebuts that presumption. See, e.g., Louisiana Ass'n of Indep. Producers and Royalty Owners v. FERC, 958 F.2d 1101, 1119 (D.C.Cir.1992); see also Wilson v. Hodel, 758 F.2d 1369, 1372-73 (10th Cir.1985). Furthermore, while both Paxson and Community assert that some later-filed applications were granted prior to some earlier-filed applications, there is no indication that administrative irregularities occurred. Paxson's real complaint is that the FCC fashioned the DTV Table in such a way that its upgrade applications were processed more slowly than others. However, Paxson has not demonstrated why this processing, or the compromises made in the DTV Table, were arbitrary.

Appendix A

IV.

Minority Television Project ("MTP"), licensee of Channel 32 in San Francisco, California, contends that the FCC's "service replication" policy unlawfully puts it at a competitive disadvantage because the policy unnecessarily entrenches the disparity between VHF and UHF channels. Most analog UHF stations have smaller service areas than analog VHF stations, for historical and technical reasons. See Electronic Indus. Ass'n Consumer Elec. Group v. FCC, 636 F.2d 689, 691-92 (D.C.Cir.1980). UHF stations are more susceptible to interference. See id. at 698 n. 17. Digital technology mitigates interference problems on the UHF band. See Sixth Report and Order, 12 F.C.C.R. at 14603-04. Nonetheless, under either an analog or digital transmission system, broadcasting on UHF channels to reach a given audience requires higher power than broadcasting on VHF channels. The FCC set power parameters of 50kW to 1000kW for digital UHF channels. Id. at 14605. This meant that some UHF channels would see their service area increased by the minimum power requirement while other broadcasters, who had an analog VHF channel but received a digital UHF channel, would see their service area decreased because of the ceiling on power that could be used for digital broadcasting on the UHF band. MTP's analog and digital channels are both in the UHF band.

MTP's contention that the FCC's service-replication policy arbitrarily entrenches the historical VHF/UHF disparity is in essence a dispute about a policy decision properly within the province of the FCC. Initially the FCC had adopted an approach that would have maximized the

service area of each DTV allotment, an approach favored by MTP, and the FCC sought comment on this allocation policy. See Sixth Further Notice, 11 F.C.C.R. at 10974-75. However, the FCC ultimately sided with the numerous broadcasters that preferred to replicate the status quo to the greatest extent possible. See Sixth Report and Order, 12 F.C.C.R. at 14605-07. While MTP is disappointed by the FCC's choice of its service-replication policy, MTP fails to demonstrate how that choice was unlawful.

In the alternative, MTP contends that the overall DTV allotment for San Francisco, and the allotment MTP received at the minimum UHF power level of 50 kW, are arbitrary because MTP's DTV channel will not reach the audience currently served. MTP does not seriously dispute that its DTV signal will propagate along the same contours as does its NTSC signal. Rather MTP maintains that its DTV allotment lacks sufficient power to penetrate physical obstacles, such as buildings and hills, and therefore its DTV channel will not reach viewers who currently receive its NTSC service. MTP is further concerned that neighboring allotments will not allow it to increase its power if necessary. However, MTP presents no data to demonstrate that the power level of its allotment is so inadequate as to amount to an arbitrary departure from the service-replication policy.[10]

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10. Moreover, should subsequent events bear out MTP's concerns, the FCC states in its brief on appeal that it retains authority to make adjustments to mitigate interference problems that may arise during the analog-to-digital transition. The FCC points out that it has already demonstrated such flexibility in allowing Mountain Broadcasting Corporation to trade DTV channels with another station. See supra note 1.

V.

Finally, Pennsylvania Telecasters Association ("PTA") challenges the FCC's decision to reallocate the spectrum that had been set aside for Channel 29 in State College, Pennsylvania without first considering PTA's application to broadcast on Channel 29. Channel 29 was one of many vacant NTSC allotments that were deleted in the course of compiling the DTV Table.

To implement its policy to reconfigure spectrum allotments to enable broadcasters using one channel to use two, the FCC needed to identify more than 1900 channels available for assignment to incumbent broadcasters. See Sixth Further Notice, 11 F.C.C.R. at 10972. The FCC had issued its Freeze Order in 1987, recognizing that any transition plan would require considerable spectrum. Among the vacant channels covered by the Freeze Order was Channel 29. The FCC had assigned the channel to State College in 1972 and it had remained vacant until imposition of the Freeze Order in 1987. In 1996, the FCC issued its proposed DTV Table in the Sixth Further Notice and announced that to facilitate finalization of the DTV Table, it would stop accepting applications for new NTSC stations as of September 20, 1996. See Sixth Further Notice, 11 F.C.C.R. at 10993. The FCC noted further that "[t]he DTV Table proposed herein was developed on the assumption that the existing vacant NTSC allotments for which no construction permit application is pending will be deleted." Id.

On September 20, 1996, PTA and another would-be broadcaster petitioned the FCC to waive the application of

the Freeze Order to Channel 29 and to accept their applications for a construction permit for that channel. When the FCC issued its final DTV Table in the Sixth Report and Order, the FCC had reassigned the spectrum allotted for Channel 29 in State College to DTV channels serving Johnstown, Pennsylvania and Williamsport, Pennsylvania. PTA petitioned for reconsideration, arguing that the elimination of Channel 29 was contrary to the FCC's commitment to "maintain and protect those vacant NTSC allotments that are the subject of pending applications." See Sixth Report and Order, 12 F.C.C.R. at 14639. The FCC denied reconsideration on the ground that PTA's "application has not been accepted, and we have not acted on its waiver request. The allotment at issue was needed and was used for DTV." Allotment Reconsideration, 13 F.C.C.R. at 7601-02.

PTA's petition for review must be denied because it misconstrues the FCC's policy. PTA filed its waiver petition and application for Channel 29 in response to that portion of the Sixth Further Notice in which the FCC stated that it would stop accepting applications for vacant analog channels in 30 days and that "we will continue our current policy of considering requests for waiver of our 1987 freeze Order on a case-by-case basis." 11 F.C.C.R. at 10992. PTA misread this statement as a promise to consider new applications for unused channels in freeze areas. To the contrary, the FCC promised only that it would consider requests to lift the freeze on a case-by-case basis, not that it would consider unused channel applications prior to lifting the freeze. Indeed, the FCC indicated that applications requiring a lifting of the freeze would not be accepted for filing unless there was a public notice to that effect. Id. The FCC ultimately

explained that neither PTA's waiver request nor the application had been accepted pursuant to the Freeze Order, and that elimination of Channel 29 and reallocation of its spectrum were necessary to accommodate the DTV Table. Allotment Reconsideration, 13 F.C.C.R. at 7601-02.

The FCC reasonably interpreted its commitment in the Sixth Report and Order to maintain and protect vacant NTSC allotments for which applications were pending, 12 F.C.C.R. at 14639, to be limited to applications for vacant allotments not subject to the Freeze Order or for which a waiver of the Freeze Order had been granted. Because under the terms of the Sixth Report and Order PTA's waiver petition did not constrain the FCC's authority to eliminate Channel 29, the FCC acted consistently with its stated expectation that "the existing vacant NTSC allotments for which no construction permit application is pending will be deleted." Sixth Further Notice, 11 F.C.C.R. at 10993.[11]

* * * * *

We conclude as we began. The FCC faced a host of difficult decisions in designing rules for the transition from analog to digital television broadcasting. After years of work,

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11. For this reason, PTA's contention based on the Due Process Clause, U.S. Const. amend V, is without merit; the FCC did not deprive PTA of a property or liberty interest by deleting Channel 29. Similarly, the FCC did not violate 47 U.S.C. § 307(b), which directs the FCC to ensure equitable distribution of radio service among communities, because that section applies to the FCC's consideration of "applications for licenses," which PTA's waiver petition was not.

a small number of the parties to the proceeding have sought relief in the court from unfavorable FCC interpretations and decisions. Even if the compromises reflected in the challenged FCC decisions were not always Solomonic in their wisdom, they were not required to be. Given the relevant statutory directives and regulations, and the competing interests of the various broadcasters and viewers concerning use of limited spectrum, the FCC reasonably and permissibly interpreted its obligations in allocating the valuable public resource that is broadcast spectrum. Accordingly, we deny the petitions for review.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-1106
and Consolidated Case Nos. 98-1212,
98-1259 and 99-1082

Community Television, Inc. et al.,

Appellants

v.

Federal Communications Commission,

Appellee

APPEALS AND PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

Before: EDWARDS, Chief Judge, HENDERSON and ROGERS, Circuit Judges.

JUDGMENT

These causes came on to be heard on the record compiled before the Federal Communications Commission and were argued by counsel. On consideration thereof, it is

Appendix A

ORDERED and **ADJUDGED**, by the Court, that the appeals and petitions are denied, in accordance with the opinion of the Court filed herein this date.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Date: July 7, 2000

Opinion for the Court filed by Circuit Judge Rogers.

APPENDIX B — RELEVANT STATUTES

47 U.S.C. § 308

§ 308. Requirements for license

(a) Writing; exceptions

The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: Provided, That (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the nonbroadcast services, that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application, but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it: Provided further, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

Appendix B

(b) Conditions

All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

(c) Commercial communication

The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 35 of this title.

(d) Summary of complaints

Each applicant for the renewal of a commercial or noncommercial television license shall attach as an exhibit to the application a summary of written comments and suggestions received from the public and maintained by the licensee (in accordance with Commission regulations) that comment on the applicant's programming, if any, and that are characterized by the commentor as constituting violent programming.

* * *

47 U.S.C. § 316

§ 316. Modification by Commission of station licenses or construction permits; burden of proof

(a)(1) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification; except that, where safety of life or property is involved, the Commission may by order provide, for a shorter period of notice.

(2) Any other licensee or permittee who believes its license or permit would be modified by the proposed action may also protest the proposed action before its effective date.

(3) A protest filed pursuant to this subsection shall be subject to the requirements of section 309 for petitions to deny.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission; except that, with respect to any issue that addresses the question of whether the proposed action would modify the license or permit of a person described in subsection (a)(2) of this section, such burdens shall be as determined by the Commission.

* * *

47 U.S.C. § 336

§ 336. Broadcast spectrum flexibility

(a) Commission action

If the Commission determines to issue additional licenses for advanced television services, the Commission —

(1) should limit the initial eligibility for such licenses to persons that, as of the date of such issuance, are licensed to operate a television

broadcast station or hold a permit to construct such a station (or both); and

(2) shall adopt regulations that allow the holders of such licenses to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity.

(b) Contents of regulations

In prescribing the regulations required by subsection (a) of this section, the Commission shall —

(1) only permit such licensee or permittee to offer ancillary or supplementary services if the use of a designated frequency for such services is consistent with the technology or method designated by the Commission for the provision of advanced television services;

(2) limit the broadcasting of ancillary or supplementary services on designated frequencies so as to avoid derogation of any advanced television services, including high definition television broadcasts, that the Commission may require using such frequencies;

(3) apply to any other ancillary or supplementary service such of the Commission's regulations as are applicable to the offering of analogous services by any other person, except that no ancillary or

supplementary service shall have any rights to carriage under section 534 or 535 of this title or be deemed a multi-channel video programming distributor for purposes of section 548 of this title;

(4) adopt such technical and other requirements as may be necessary or appropriate to assure the quality of the signal used to provide advanced television services, and may adopt regulations that stipulate the minimum number of hours per day that such signal must be transmitted; and

(5) prescribe such other regulations as may be necessary for the protection of the public interest, convenience, and necessity.

(c) Recovery of license

If the Commission grants a license for advanced television services to a person that, as of the date of such issuance, is licensed to operate a television broadcast station or holds a permit to construct such a station (or both), the Commission shall, as a condition of such license, require that either the additional license or the original license held by the licensee be surrendered to the Commission for reallocation or reassignment (or both) pursuant to Commission regulation.

(d) Public interest requirement

Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity. In the

Appendix B

Commission's review of any application for renewal of a broadcast license for a television station that provides ancillary or supplementary services, the television licensee shall establish that all of its program services on the existing or advanced television spectrum are in the public interest. Any violation of the Commission rules applicable to ancillary or supplementary services shall reflect upon the licensee's qualifications for renewal of its license.

(e) Fees

(1) Services to which fees apply

If the regulations prescribed pursuant to subsection (a) of this section permit a licensee to offer ancillary or supplementary services on a designated frequency —

(A) for which the payment of a subscription fee is required in order to receive such services, or

(B) for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required),

the Commission shall establish a program to assess and collect from the licensee for such designated

frequency an annual fee or other schedule or method of payment that promotes the objectives described in subparagraphs (A) and (B) of paragraph (2).

(2) Collection of fees

The program required by paragraph (1) shall —

(A) be designed (i) to recover for the public a portion of the value of the public spectrum resource made available for such commercial use, and (ii) to avoid unjust enrichment through the method employed to permit such uses of that resource;

(B) recover for the public an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered had such services been licensed pursuant to the provisions of section 309(j) of this title and the Commission's regulations thereunder; and

(C) be adjusted by the Commission from time to time in order to continue to comply with the requirements of this paragraph.

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(3) Treatment of revenues

(A) General rule

Except as provided in subparagraph (B), all proceeds obtained pursuant to the regulations required by this subsection shall be deposited in the Treasury in accordance with chapter 33 of Title 31.

(B) Retention of revenues

Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this section and regulating and supervising advanced television services. Such offsetting collections shall be available for obligation subject to the terms and conditions of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis.

(4) Report

Within 5 years after February 8, 1996, the Commission shall report to the Congress on the implementation of the program required by this

subsection, and shall annually thereafter advise the Congress on the amounts collected pursuant to such program.

(f) Preservation of low-power community television broadcasting

(1) Creation of class A licenses

(A) Rulemaking required

Within 120 days after November 29, 1999, the Commission shall prescribe regulations to establish a class A television license to be available to licensees of qualifying low-power television stations. Such regulations shall provide that —

(i) the license shall be subject to the same license terms and renewal standards as the licenses for full-power television stations except as provided in this subsection; and

(ii) each such class A licensee shall be accorded primary status as a television broadcaster as long as the station continues to meet the requirements for a qualifying low-power station in paragraph (2).

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(B) Notice to and certification by licensees

Within 30 days after November 29, 1999, the Commission shall send a notice to the licensees of all low-power televisions licenses that describes the requirements for class A designation. Within 60 days after November 29, 1999, licensees intending to seek class A designation shall submit to the Commission a certification of eligibility based on the qualification requirements of this subsection. Absent a material deficiency, the Commission shall grant certification of eligibility to apply for class A status.

(C) Application for and award of licenses

Consistent with the requirements set forth in paragraph (2)(A) of this subsection, a licensee may submit an application for class A designation under this paragraph within 30 days after final regulations are adopted under subparagraph (A) of this paragraph. Except as provided in paragraphs (6) and (7), the Commission shall, within 30 days after receipt of an application of a licensee of a qualifying low-power television station that is acceptable for filing, award such a class A television station license to such licensee.

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(D) Resolution of technical problems

The Commission shall act to preserve the service areas of low-power television licensees pending the final resolution of a class A application. If, after granting certification of eligibility for a class A license, technical problems arise requiring an engineering solution to a full-power station's allotted parameters or channel assignment in the digital television Table of Allotments, the Commission shall make such modifications as necessary —

> (i) to ensure replication of the full-power digital television applicant's service area, as provided for in sections 73.622 and 73.623 of the Commission's regulations (47 CFR 73.622, 73.623); and
>
> (ii) to permit maximization of a full-power digital television applicant's service area consistent with such sections 73.622 and 73.623,

if such applicant has filed an application for maximization or a notice of its intent to seek such maximization by December 31, 1999, and filed a bona fide application for

maximization by May 1, 2000. Any such applicant shall comply with all applicable Commission rules regarding the construction of digital television facilities.

(E) Change applications

If a station that is awarded a construction permit to maximize or significantly enhance its digital television service area, later files a change application to reduce its digital television service area, the protected contour of that station shall be reduced in accordance with such change modification.

(2) Qualifying low-power television stations

For purposes of this subsection, a station is a qualifying low-power television station if —

(A)(i) during the 90 days preceding November 29, 1999 —

(I) such station broadcast a minimum of 18 hours per day;

(II) such station broadcast an average of at least 3 hours per week of programming that was produced within the

market area served by such station, or the market area served by a group of commonly controlled low-power stations that carry common local programming produced within the market area served by such group; and

(III) such station was in compliance with the Commission's requirements applicable to low-power television stations; and

(ii) from and after the date of its application for a class A license, the station is in compliance with the Commission's operating rules for full-power television stations; or

(B) the Commission determines that the public interest, convenience, and necessity would be served by treating the station as a qualifying low-power television station for purposes of this section, or for other reasons determined by the Commission.

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(3) Common ownership

No low-power television station authorized as of November 29, 1999 shall be disqualified for a class A license based on common ownership with any other medium of mass communication.

(4) Issuance of licenses for advanced television services to television translator stations and qualifying low-power television stations

The Commission is not required to issue any additional license for advanced television services to the licensee of a class A television station under this subsection, or to any licensee of any television translator station, but shall accept a license application for such services proposing facilities that will not cause interference to the service area of any other broadcast facility applied for, protected, permitted, or authorized on the date of filing of the advanced television application. Such new license or the original license of the applicant shall be forfeited after the end of the digital television service transition period, as determined by the Commission. A licensee of a low-power television station or television translator station may, at the option of licensee, elect to convert to the provision of advanced television services on its analog channel, but shall not be required to convert to digital operation until the end of such transition period.

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(5) No preemption of section 337

Nothing in this subsection preempts or otherwise affects section 337 of this title.

(6) Interim qualification

(A) Stations operating within certain bandwidth

The Commission may not grant a class A license to a low-power television station for operation between 698 and 806 megahertz, but the Commission shall provide to low-power television stations assigned to and temporarily operating in that bandwidth the opportunity to meet the qualification requirements for a class A license. If such a qualified applicant for a class A license is assigned a channel within the core spectrum (as such term is defined in MM Docket No. 87-286, February 17, 1998), the Commission shall issue a class A license simultaneously with the assignment of such channel.

(B) Certain channels off-limits

The Commission may not grant under this subsection a class A license to a low-power television station operating on a channel within the core spectrum that includes any

of the 175 additional channels referenced in paragraph 45 of its February 23, 1998, Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order (MM Docket No. 87-268). Within 18 months after November 29, 1999, the Commission shall identify by channel, location, and applicable technical parameters those 175 channels.

(7) No interference requirement

The Commission may not grant a class A license, nor approve a modification of a class A license, unless the applicant or licensee shows that the class A station for which the license or modification is sought will not cause —

(A) interference within —

(i) the predicted Grade B contour (as of November 29, 1999, or November 1, 1999, whichever is later, or as proposed in a change application filed on or before such date) of any television station transmitting in analog format; or

(ii)(I) the digital television service areas provided in the DTV Table of Allotments;

(II) the areas protected in the Commission's digital television regulations (47 CFR 73.622(e) and (f));

(III) the digital television service areas of stations subsequently granted by the Commission prior to the filing of a class A application; and

(IV) stations seeking to maximize power under the Commission's rules, if such station has complied with the notification requirements in paragraph (1)(D);

(B) interference within the protected contour of any low-power television station or low-power television translator station that —

(i) was licensed prior to the date on which the application for a class A license, or for the modification of such a license, was filed;

(ii) was authorized by construction permit prior to such date; or

(iii) had a pending application that was submitted prior to such date; or

(C) interference within the protected contour of 80 miles from the geographic center of the areas listed in section 22.625(b)(1) or 90.303 of the Commission's regulations (47 CFR 22.625(b)(1) and 90.303) for frequencies in —

(i) the 470-512 megahertz band identified in section 22.621 or 90.303 of such regulations; or

(ii) the 482-488 megahertz band in New York.

(8) Priority for displaced low-power stations

Low-power stations that are displaced by an application filed under this section shall have priority over other low-power stations in the assignment of available channels.

(g) Evaluation

Within 10 years after the date the Commission first issues additional licenses for advanced television services, the

Appendix B

Commission shall conduct an evaluation of the advanced television services program. Such evaluation shall include —

(1) an assessment of the willingness of consumers to purchase the television receivers necessary to receive broadcasts of advanced television services;

(2) an assessment of alternative uses, including public safety use, of the frequencies used for such broadcasts; and

(3) the extent to which the Commission has been or will be able to reduce the amount of spectrum assigned to licensees.

(h) Definitions

As used in this section:

(1) Advanced television services

The term "advanced television services" means television services provided using digital or other advanced technology as further defined in the opinion, report, and order of the Commission entitled "Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service", MM Docket 87-268, adopted September 17, 1992, and successor proceedings.

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(2) Designated frequencies

The term "designated frequency" means each of the frequencies designated by the Commission for licenses for advanced television services.

(3) High definition television

The term "high definition television" refers to systems that offer approximately twice the vertical and horizontal resolution of receivers generally available on February 8, 1996, as further defined in the proceedings described in paragraph (1) of this subsection.

* * * *

APPENDIX C — PAPPAS' MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR RECONSIDERATION DATED JULY 17, 1998

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 87-268

In the Matter of

Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service

To: The Commission

PAPPAS TELECASTING OF SOUTHERN CALIFORNIA, L.L.C.'S MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR RECONSIDERATION OF THE COMMISSION'S MEMORANDUM OPINION AND ORDER ON RECONSIDERATION OF THE FIFTH REPORT AND ORDER

On May 1, 1998, Pappas Telecasting of Southern California, L.L.C. ("Pappas") — in conjunction with its commonly-owned affiliate, Pappas Telecasting of the Midlands, a California Limited Partnership — submitted to the Commission a joint Petition for Reconsideration of the Commission's Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order in this proceeding (the "Pappas Petition for Reconsideration").

Appendix C

The Pappas Petition for Reconsideration argued that substantial equities favor reconsideration of the Commission's *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order* in this proceeding, 13 FCC Rcd 6860 (1998) (the "*Fifth Report and Order Reconsideration Order*"), to the extent that the *Fifth Report and Order Reconsideration Order* ruled that grantees of NTSC television station authorizations whose grants were received after April 3, 1997 are not eligible to receive a so-called "paired" digital television ("DTV") broadcasting station channel allotment. In that connection, the Pappas Petition for Reconsideration pointed out that Pappas expected to fall within the affected class of grantees, inasmuch as Pappas expected to receive a post-April 3, 1997 grant by the Commission of Pappas's then-pending application, as amended, for a construction permit to build a new UHF commercial television broadcasting station to operate on NTSC Channel 54 in Avalon, California. (Pappas's application for the construction permit to build the new NTSC station on Channel 54 in Avalon was subsequently granted in an *Order*, FCC 98I-27, adopted June 1, 1998 and released June 2, 1998 by the Commission's Assistant General Counsel for the Administrative Law Division.)

The Pappas Petition for Reconsideration set forth in detail the equities favoring an allotment of a DTV channel to be paired with the NTSC Channel 54 allotment at Avalon, with particular reference to the history of the Commission's proceedings that led to a grant of Pappas's application for a construction permit for the new NTSC station on Channel 54 in Avalon. In the Pappas Petition for Reconsideration, Pappas Telecasting of the Midlands, a California Limited

Partnership ("Pappas/Midlands"), also contended that the grantee of an NTSC television station authorization whose grant was received after April 3, 1997 should be eligible for a DTV channel allotment, and proceeded to identify a DTV allotment that could be paired with Pappas/Midlands' recently-authorized new NTSC television broadcasting station on Channel 23 in Ames, Iowa, without disrupting any DTV or NTSC television service.

Pappas's consulting broadcast engineer, Neil M. Smith of the firm of Smith and Fisher in Washington, D.C., has recently identified a DTV channel allotment that can be made to Avalon for pairing with the NTSC allotment of Channel 54. That DTV channel allotment is Channel 29. Simultaneously herewith under separate cover, Pappas is submitting a Supplement to the Pappas Petition for Reconsideration (the "Supplement") that includes Mr. Smith's Engineering Statement, as Appendix A. Mr. Smith's Engineering Statement demonstrates that the allotment of DTV Channel 29 to Avalon, using as the allotment site Mount Wilson in Southern California, may be made ". . . with no adverse impact on other digital or analog services." *See* Supplement, Appendix A, Mr. Smith's Engineering Statement, at Page 1.

Pappas submits that the Supplement provides information that is materially beneficial to the Commission in considering the Pappas Petition for Reconsideration. In fact, the Supplement completes the Pappas Petition for Reconsideration by providing the Commission with a specific DTV channel that may be allotted to Avalon for pairing with NTSC Channel 54 in a manner that would afford the relief requested in the Pappas Petition for Reconsideration.

For that reason, Pappas respectfully submits that the Commission's consideration of the Supplement, in accordance with Section 1.429(d) of the Commission's Rules, would clearly serve the public interest.

WHEREFORE, Pappas respectfully moves the Commission for leave to file the Supplement.

Respectfully submitted,

PAPPAS TELECASTING OF SOUTHERN CALIFORNIA, L.L.C.

By: s/ John Griffith Johnson, Jr.
John Griffith Johnson, Jr.
David D. Burns

Its Attorneys

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July 17, 1998

APPENDIX D — PAPPAS' SUPPLEMENT TO PETITION FOR RECONSIDERATION DATED JULY 17, 1998

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 87-268

In the Matter of

Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service

To: The Commission

SUPPLEMENT TO PETITION FOR RECONSIDERATION OF THE COMMISSION'S MEMORANDUM OPINION AND ORDER ON RECONSIDERATION OF THE FIFTH REPORT AND ORDER

Pappas Telecasting of Southern California, L.L.C. ("Pappas"), the grantee of a construction permit to build a new UHF commercial television broadcasting station on NTSC Channel 54 in Avalon, California,[1] by counsel and in

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1. Pappas's application for the construction permit, File No. BPCT-860210KM, as amended, was granted in an *Order*, FCC 98I-27, adopted June 1, 1998 and released June 2, 1998, by the Commission's Assistant General Counsel for the Administrative Law Division. The application was originally filed on February 10, 1986 by Island Broadcasting Limited Partnership, a California Limited Partnership ("Island"), and was prosecuted for nearly 12 years in that capacity. The application was amended on January 30, 1998 in order to substitute Pappas for Island as the applicant.

accordance with Section 1.429(d) of the Commission's Rules, hereby respectfully supplements Pappas's and Pappas Telecasting of the Midlands, a California Limited Partnership's joint Petition for Reconsideration of the Commission's Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order in this proceeding (the "Pappas Petition for Reconsideration").[2] The Pappas Petition for Reconsideration was filed with the Commission in this proceeding on May 1, 1998.

In the Pappas Petition for Reconsideration, Pappas argued that substantial equities favor reconsideration of the Commission's *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order* in this proceeding, 13 FCC Red 6860 (1998) (the "*Fifth Report and Order Reconsideration Order*"), to the extent that the *Fifth Report and Order Reconsideration Order* ruled that grantees of NTSC television station authorizations whose grants were received after April 3, 1997 are not eligible to receive a so-called "paired" digital television ("DTV") broadcasting station channel allotment. The Pappas Petition for Reconsideration set forth those equities in detail, with particular reference to the history of the Commission's proceedings that led to a grant of Pappas's application for a construction permit for a new NTSC television broadcasting station on Channel 54 in Avalon. In the Pappas Petition for Reconsideration, Pappas Telecasting of the Midlands, a California Limited Partnership ("Pappas/Midlands") —

---

2. Simultaneously herewith under separate cover, Pappas is submitting a Motion for Leave to File this Supplement to the Pappas Petition for Reconsideration, as required by Section 1.429(d) of the Rules.

a commonly-owned affiliate of Pappas — also contended that the grantee of an NTSC television station authorization whose grant was received after April 3, 1997 should be eligible for a DTV channel allotment, and proceeded to identify a DTV allotment that could be paired with Pappas/ Midlands' recently-authorized new NTSC television broadcasting station on Channel 23 in Ames, Iowa, without disrupting any DTV or NTSC television service.

Pappas's consulting broadcast engineer, Neil M. Smith of the firm of Smith and Fisher in Washington, D.C., has recently identified a DTV channel allotment that can be made to Avalon for pairing with the NTSC allotment of Channel 54. That DTV channel allotment is Channel 29. According to Mr. Smith's Engineering Statement, a copy of which is appended to this Supplement to the Pappas Petition for Reconsideration as Appendix A, the allotment of DTV Channel 29 to Avalon, using as the allotment site Mount Wilson in Southern California, may be made ". . . with no adverse impact on other digital or analog services." *See* Mr. Smith's Engineering Statement, at Page 1.

Given the substantial equities that support allotting a DTV channel to Avalon to be paired with the NTSC allotment of Channel 54, as set forth in the Pappas Petition for Reconsideration, and given Mr. Smith's identification of a DTV channel allotment that can be made to Avalon without disturbing any other DTV or NTSC service, Pappas respectfully submits that the Commission should reconsider its earlier determination in the *Fifth Report and Order Reconsideration Order* and should take the appropriate steps to allot DTV Channel 29 to Avalon.

Appendix D

Respectfully submitted,

PAPPAS TELECASTING OF SOUTHERN CALIFORNIA, L.L.C.

By: s/ John Griffith Johnson, Jr.
John Griffith Johnson, Jr.
David D. Burns

Its Attorneys

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July 17, 1998

Appendix D

APPENDIX A

SMITH AND FISHER
WASHINGTON, D.C.

ENGINEERING STATEMENT

The engineering data contained herein have been prepared on behalf of PAPPAS TELECASTING OF SOUTHERN CALIFORNIA, L.L.C., permittee of a new television broadcast station to operate on Channel 54 in Avalon, California, in support of its Supplement to its Petition for Reconsideration of the *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order* in MM Docket No. 87-268.

The Commission has not provided DTV allotments to certain analog stations authorized in the recent past, including this Avalon facility. However, it would appear that a channel is available for this purpose.

Using an assumed site on Mount Wilson at 34° 13' 36", 118° 03' 59" and assuming an ERP of 50 kw and an antenna center of radiation of 1789 meters AMSL, we find that Channel 29 can be used for DTV operation with no adverse impact on other digital or analog services. Attached is a tabulation showing the closest allotments on Channels 28, 29, and 30, which are discussed as follows.

On Channel 28, the pertinent allotment is the NTSC operation of KCET, Los Angeles. This facility is essentially colocated with the proposed operation, which meets the Commission's requirements.

Appendix D

On Channel 29, the only allotment close enough to be of concern is KBAK-TV, Bakersfield. However, an interference study employing the NTIA on-line service reveals that with or without the proposed DTV facility, the KBAK-TV population which receives interference is zero.

On Channel 30, the only allotment close enough to require study is KPXN, San Bernardino. At 21.2 miles, KPXN would not be colocated with the proposed DTV facility but would be well within the 55 mile arc. However, an interference study reveals that KPXN will receive DTV interference to an area having a population of 437,000, and that the addition of the proposed DTV facility would not change this figure.

Thus, DTV Channel 29 can be allotted to Avalon with no adverse impact on any television station, based on the Commission's standards. Further, with the facilities specified, the DTV coverage contour will completely encompass the community of Avalon.

I declare under penalty of perjury that the foregoing statements and the attached tabulation are true and correct to the best of my knowledge and belief.

s/ Neil M. Smith
NEIL M. SMITH

June 23, 1998

SMITH AND FISHER
WASHINGTON, D.C.

ALLOCATION STUDY

PROPOSED DTV CHANNEL 29
AVALON, CALIFORNIA

Channel	Analog or Digital	Call	Location	Mileage Separation Required	Actual	Result
28	A	KCET	Los Angeles, CA	<6, >55	0.3	OK
29	A	KBAK-TV	Bakersfield, CA	152	89.6	-62.4
29	A	Alloc.	Ensenada, BJ	152	183.3	+31.3
29	D	KFBT	Las Vegas, NV	139	208.3	+69.3
30	A	KPXN	San Bernardino, CA	<6, >55	21.2	-33.8
30	D	KPBS	San Diego, CA	<20, >55	124.0	+69.0

APPENDIX E — RELEVANT DOCUMENTS FROM THE FEDERAL COMMUNICATIONS COMMISSION

(Omitted here but printed separately as Lodging Appendix)

Supreme Court, U.S.
FILED
DEC 08 2000
CLERK

(2)

No. 00-522

In the Supreme Court of the United States

PAPPAS TELECASTING OF SOUTHERN CALIFORNIA, L.L.C., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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1699

QUESTION PRESENTED

Whether the Federal Communications Commission acted within the scope of its authority under Title III of the Communications Act of 1934, 47 U.S.C. 301 *et seq.*, and in compliance with the Administrative Procedure Act, 5 U.S.C. 706, when it declined to award petitioner a license to provide digital television service.

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No. 00-522

PAPPAS TELECASTING OF SOUTHERN CALIFORNIA, L.L.C., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 216 F.3d 1133. The opinions and orders of the Federal Communications Commission (Pet. Lodging App. L315-L474, L268-L314, L104-L267) are reported at 14 F.C.C.R. 1348, 13 F.C.C.R. 6860, and 12 F.C.C.R. 12,809.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a-29a) was entered on July 7, 2000. The petition for a writ of certiorari was filed on October 5, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from a proceeding in which the Federal Communications Commission (Commission) adopted policies to promote the new technology of digital television (DTV). Providing for the transition from today's analog television technology to DTV required the Commission to resolve myriad technical and policy concerns. In addition, because DTV will require viewers to obtain either new television sets or converters, it was necessary as a practical matter for the Commission to establish a transitional period during which existing television broadcasters will operate two stations—one using the old analog technical standards and the other using the new DTV standards. The Commission properly applied the applicable statutory requirements in addressing those concerns and allocating the initial DTV licenses at issue in this case.

1. Section 307(b) of the Communications Act of 1934, 47 U.S.C. 307(b), requires the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." In the context of analog television broadcast stations, the Commission historically has fulfilled its statutory spectrum-allocation responsibilities by determining technical limits, such as power and antenna height, within which stations may operate, and by regulating the geographic separation between stations in order to maximize the number of available channels and protect stations from interference.* See, *e.g.*, 47 C.F.R. 73.610, 73.612, 73.614.

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* An industry group known as the National Television Systems Committee developed technical standards for television

In 1987, recognizing that new digital technologies might improve significantly the picture and sound quality of broadcast television, the Commission began an inquiry "to consider the technical and public policy issues surrounding the use of advanced television technologies by television broadcast licensees." *Advanced Television Sys.*, 2 F.C.C.R. 5125, 5126 (1987). In 1991, the Commission began a rulemaking proceeding in which it proposed, among other things, that any conversion to DTV should include a transitional period during which existing television broadcasters could operate two channels at the same time, so as to provide the same programs to existing NTSC television receivers as well as new DTV receivers. *Advanced Television Sys.*, 6 F.C.C.R. 7024, 7029-7033 (1991) (*NPRM*). The Commission proposed to limit the parties initially eligible for "paired" digital channels to "existing broadcasters," defined as: (1) existing analog licensees; (2) parties holding construction permits to build new analog stations; and (3) parties with applications for construction permits pending as of the date of adoption of the *NPRM* (October 24, 1991), whose applications were ultimately granted. *Id.* at 7025-7026 & n.21. The Commission noted that established broadcasters had invested "considerable resources and expertise in the present system and represent a large pool of experienced talent." *Id.* at 7025. Preserving the industry's existing ownership structure also would minimize the "potential for disruption" inherent in the technological change to DTV, although the Commission emphasized that broadcasters would have to surrender one of their paired channels at the end of the transition. *Id.* at 7025,

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transmission in the 1940s and 1950s. Those standards, which the Commission adopted, are known as the NTSC standards.

7026-7027. The Commission further developed its plan for the transition to DTV in a series of orders that followed the *NPRM*. Pet. App. 6a.

2. In February 1996, before the Commission's DTV rulemakings were complete, Congress added to the Communications Act a new Section 336, entitled "Broadcast Spectrum Flexibility." See Telecommunications Act of 1996, Pub. L. No. 101-104, § 201, 110 Stat. 107. New Section 336(a)(1) established statutory eligibility criteria for any initial DTV licenses: "If the Commission determines to issue additional licenses for advanced television services, the Commission * * * should limit the initial eligibility for such licenses to persons that, as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct such a station (or both)." 47 U.S.C. 336(a)(1) (Supp. IV 1998).

In July 1996, the FCC adopted a further notice of proposed rulemaking seeking comment on initial DTV allotments, procedures for assigning DTV frequencies, and related technical and policy issues. *Advanced Television Sys.*, 11 F.C.C.R. 10,968 (1996) (Pet. App. L1-L103). One of the ensuing orders revised the Commission's initial eligibility standards for DTV channels, in part to implement Section 336(a)(1). *Advanced Television Sys.*, 12 F.C.C.R. 12,809 (1997) (*Fifth Report and Order*) (Pet. Lodging App. L104-L267). Another, issued the same day, made DTV channel allotments for different areas of the United States. *Advanced Television Sys.*, 12 F.C.C.R. 14,588 (1997) (*Sixth Report and Order*). Specifically, in the *Fifth Report and Order*, the Commission limited the class of broadcasters eligible to receive a second, paired DTV channel during the transition period to parties who, as of the date of the *Fifth Report and Order* and *Sixth Report and Order*, were

either licensed to operate a full-service analog television station, or held a permit to construct such a station. Pet. Lodging App. L111-L112. Although the Commission believed that new Section 336(a)(1) foreclosed the Commission's former policy of extending "initial eligibility" for a paired DTV channel to broadcasters whose applications for an analog station had not yet been granted, 47 U.S.C. 336(a)(1) (Supp. IV 1998), the Commission stated that it would "give particular consideration for assigning temporary DTV channels to new licensees who applied on or before October 24, 1991, given the reliance that these parties may have placed on rules we adopted before passage of the 1996 Act." Pet. Lodging App. L111-L112 & n.26.

The initial DTV channel allotments made in the accompanying *Sixth Report and Order* constituted the first phase of a three-phased licensing process for parties who were eligible to receive DTV licenses under Section 336(a)(1) and the *Fifth Report and Order*. The second phase would consist of obtaining a DTV construction permit, to be followed by an application for a DTV operating license. Pet. Lodging App. L133-L136.

In February 1998, the Commission released two decisions responding to petitions for reconsideration. *Advanced Television Sys.*, 13 F.C.C.R. 6860 (1998) (*Service Reconsideration Order*) (Pet. Lodging App. L268-L314); *Advanced Television Sys.*, 13 F.C.C.R. 7418 (1998). In pertinent part, the Commission affirmed its decision to implement Section 336(a)(1) through a three-phased licensing process, beginning with the initial, simultaneous issuance of DTV licenses to eligible broadcasters. The Commission explained that using the Commission's traditional two-phased process (an application for a construction permit followed by an application for an operating license), without the simul-

taneous initial licensing phase, "would have prevented the establishment of a date certain at which to determine initial eligibility" as required by Section 336(a)(1), and could have created prolonged uncertainty about broadcasters' eligibility for DTV licenses. Pet. Lodging App. L270. Establishing a date certain for issuing the initial DTV licenses also enabled the Commission to make DTV channel allotments in the *Sixth Report and Order*. *Ibid.*

The Commission also addressed arguments that so-called "pending applicants"—parties such as petitioner, whose application for a permit to construct an analog station in Avalon, California, was pending when the *Fifth Report and Order* was issued—should be able to participate in the transition to DTV. The Commission rejected requests to include the pending applicants among the recipients of initial, paired DTV licenses, but it gave the pending applicants two new options for using analog licenses they were awarded after April 3, 1997 (the date of adoption of the *Fifth Report and Order*). The pending applicants could (1) use their newly granted channel for DTV, or (2) convert to DTV after initially providing analog service, if the conversion would not create interference problems. The Commission also streamlined its own procedures to facilitate construction of DTV facilities by pending applicants such as petitioner. Pet. Lodging App. L271-L274.

The Commission's reconsideration orders themselves became the subject of petitions for reconsideration. The Commission again rejected the argument that those applicants whose applications for analog channels were granted after April 3, 1997, should receive paired DTV channels to use during the DTV transition period. *Advanced Television Sys.*, 14 F.C.C.R. 1348, 1352-1359 (1998) (Pet. Lodging App. L315, L319-L326). The

Commission noted that, although it had stated in the *Fifth Report and Order* its intention to give "particular consideration" to such applicants in light of the change of law in 1996, the Commission also had notified the applicants that they would have low priority in the event there was a shortage of DTV channels. Pet. Lodging App. L325-L326. The Commission found that its *Service Reconsideration Order* had "fully taken account of and accommodated the desires of these licensees to convert to digital television by allowing them to convert on their analog channel regardless of the fact that they were not eligible for initial DTV licenses." *Id.* at L326. In view of the relief the Commission already had provided pending applicants, the competing interests of other potential spectrum users, and "the disruption that could be caused" by trying to award licenses to all of the pending applicants, the Commission again declined to grant paired DTV channels to this group. *Ibid.*

3. The court of appeals denied petitions for review filed by petitioner and others. Pet. App. 1a-27a. With respect to petitioner's arguments, the court of appeals first rejected a challenge to "the [Commission]'s entire DTV licensing scheme," in which petitioner maintained that Section 308(a) of the Communications Act, 47 U.S.C. 308(a), required each recipient of a paired DTV license to submit an application for that paired license. Pet. App. 11a. The court of appeals concluded that the Commission "reasonably construed the Communications Act to allow it to modify existing broadcast licenses and construction permits" pursuant to 47 U.S.C. 316(a)(1), so as "to render incumbent broadcasters initially eligible to provide DTV services * * * without having received written applications." *Id.* at 16a.

The court of appeals also rejected petitioner's claim that the Commission did not adequately explain the basis for its decision not to grant petitioner a second, designated DTV channel during the transition period. The court found that the Commission "left no mystery as to its rationale." Pet. App. 17a. Having made initial awards of DTV spectrum to existing broadcasters as required by Section 336(a)(1), the Commission decided that the remaining DTV spectrum would be put to better use by parties other than petitioner. *Ibid.* The court also concluded that the Commission's "rationale * * * is hardly arbitrary and capricious. The agency reasonably balanced competing demands for spectrum and allowed the pending applicants considerable flexibility in making the transition to DTV." *Id.* at 18a.

Finally, the court of appeals rejected petitioner's argument that the Commission committed reversible error by failing to consider late-filed evidence about the Avalon, California, market area. Pet. App. 18a n.9. Because petitioner's untimely evidence was not accepted into the record, the Commission correctly refused to consider it. Moreover, the Commission deemed a similar record submission by another party "immaterial" to initial DTV licensing. *Ibid.*

ARGUMENT

Petitioner asks this Court to grant certiorari in order to correct an alleged administrative error in making broadcast licensing decisions. There was no error, and the decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. The petition involves an initial licensing program for DTV that will not recur, and it raises no issue that warrants review by this Court.

1. Petitioner renews its claim (Pet. 10-22) that simultaneous issuance of DTV licenses to the recipients designated in Section 336(a)(1), on a date certain, violated Section 308(a). Section 308(a) provides (with exceptions not relevant here) that the Commission "may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it." Pet. App. 30a. As the court of appeals held, that provision should be read together with other provisions of the Communications Act, particularly Section 336(a)(1)'s rule governing initial DTV licenses and Section 316, which allows the Commission to modify existing licenses. *Id.* at 13a; see generally *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993) (statutory provisions should be read by reference to the whole law); *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989) (specific statutory provisions apply instead of more general ones). The court of appeals also noted that it was obligated to defer to reasonable Commission interpretations of ambiguous statutory provisions. Pet. App. 13a-14a; see *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

The Commission reasonably harmonized the relevant provisions of the Communications Act in the context of initial DTV licenses. Section 316(a)(1) of the Act provides, in pertinent part, that "[a]ny station license or construction permit may be modified by the Commission * * * if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this [Act] * * * will be more fully complied with." 47 U.S.C. 316(a)(1). The Commission determined (Pet. Lodging App. L129-L130, L284-L285, L287) that Section 316(a)(1) authorized it to issue DTV broadcast spec-

trum to existing analog license holders as of a specified date of issuance, in order to implement the requirements of Section 336(a)(1). As the court of appeals pointed out, it has long recognized that the Commission may, on its own initiative and without applications from the affected broadcasters, modify television channel assignments in response to changed circumstances. Pet. App. 14a (citing *Peoples Broadcasting Co.* v. *United States*, 209 F.2d 286, 287 (D.C. Cir. 1953)). Indeed, the Commission's plan for a transition from analog channels to digital channels was similar to the factual circumstances in *Peoples Broadcasting*, where the Commission required a broadcaster to shift its signal from one analog channel to another. *Ibid.* The court of appeals additionally noted that there was no policy basis for requiring licensed broadcasters to file applications for the paired DTV channels: because Section 336(a)(1) identified the entities eligible to receive initial DTV licenses, there would not have been competition for these licenses even if applications had been submitted. *Id.* at 16a.

Petitioner responds to the court of appeals by arguing that Section 316(a) applies only to "unwelcome" modifications in which the "licensee's interests are being adversely impacted." Pet. 16-17. Petitioner's argument was not presented below and the court of appeals did not consider it. That alone is grounds for refusing to entertain the argument. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984). Petitioner's suggested limitation on the Commission's modification power—which would give the Commission greater freedom to injure broadcasters through modifications than to assist them—also finds no support in the plain language of the statute. Nor is it articulated in the two appellate decisions on which petitioner relies.

One of those decisions, in any event, is a decision of the court below. If there were any inconsistency between *Transcontinent Television Corp.* v. *FCC*, 308 F.2d 339, 343 (D.C. Cir. 1962), and the decision of the court of appeals in this case—which there is not—such inconsistency would be a matter for the court of appeals to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957).

The court of appeals also correctly rejected petitioner's reliance (Pet. 19-20) on *MCI Telecommunications Corp.* v. *AT&T*, 512 U.S. 218 (1994). This Court held in *MCI* that the Commission's power to "modify" the requirements of 47 U.S.C. 203, under which telecommunications common carriers file their rates in a tariff, did not authorize the Commission to make the "basic and fundamental change[]" of eliminating the tariff requirement. 512 U.S. at 225. As the court of appeals held in this case (Pet. App. 14a-15a), awarding paired DTV channels to analog television broadcasters, until the conversion to DTV is accomplished, did not work that sort of fundamental change in the underlying broadcast licenses. "Broadcasters will begin and end the transition period broadcasting television programming to the public under very similar terms." *Id.* at 15a. Petitioner offers no substantial reason why this Court should review the court of appeals' correct and fact-bound conclusion. See Pet. 20-21.

2. The court of appeals likewise was correct in rejecting petitioner's arguments (Pet. 22-29) that the Commission did not adequately explain its reasons for refusing to award paired licenses to pending applicants as a group, and to petitioner specifically. The court of appeals determined that the Commission "clearly" provided an adequate explanation of its rationale for denying the class of pending applicants paired licenses

in light of Section 336(a)(1). Pet. App. 17a; see pp. 4-7, *supra*. The Commission also afforded relief—in the form of flexibility to use analog channels for DTV—that addressed any "equitable" claim the pending applicants might have as a result of the statutorily mandated change eligibility requirements. Pet. App. 17a-18a. Finally, the court of appeals held that petitioner's late-filed evidence was not properly part of the record, and that it would not have affected the outcome of the Commission's licensing proceeding in any event. *Id.* at 18a n.9; see Pet. Lodging App. L325-L326. None of those determinations by the court of appeals raises any issue that warrants further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

PAPPAS TELECASTING OF SOUTHERN CALIFORNIA, L.L.C.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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The 12-page brief of respondents' opposing review ("Opp. Br.") is more notable for what it omits than what it asserts. Respondents do not dispute that, under Section 308 of the Communications Act, 47 U.S.C. § 308, the Federal Communications Commission (the "Commission") may grant station licenses or modifications thereof "only upon written application therefor" except in cases of emergency or war. Pet. App. 30a. Nor do respondents dispute that the court of appeals accepted with virtually no scrutiny the Commission's claim that its action on April 3, 1997 to issue hundreds of digital television ("DTV") station licenses without first having received written applications for those licenses was merely an exercise of the agency's authority to "modify" existing licenses under Section 316 of the Communications Act for which, *it contends*, no written applications were required.[1]

As noted in the petition for a writ of certiorari, the Commission's mass "issuance" of hundreds of new and technologically distinct DTV authorizations cannot reasonably or fairly be termed a "modification" of existing analog licenses, and, in any event, neither the agency nor the court of appeals explained why the Commission's action qualified as a "modification" under Section 316 (requiring no written application), but not as a "modification" under Section 308 (which does require written application).

Rather than address those points directly, respondents invite this Court to disregard the inconsistency between the Commission's action and Section 308 because this matter "involves an initial licensing program for DTV that will not recur" and because petitioner's suggested reconciliation between Section 308 and Section 316 "was not presented below and the court of appeals did not consider it." Opp. Br. 8, 10.

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1. 47 U.S.C. § 316(a)(1) ("Any station license or construction permit may be modified by the Commission . . . .") Pet. App. 32a.

This Court should decline respondents' invitation and should grant the petition, because the decision below creates substantial uncertainty regarding the scope of the Commission's authority to implement sweeping changes to the structure and distribution of broadcast licenses under the guise of its power to "modify" existing licenses under Section 316 of the Communication Act, a question that extends well beyond the DTV licensing program (significant in its own right). Respondents' claim that the court of appeals did not consider petitioner's proposed reconciliation of Section 308 and Section 316 fails to recognize that it was the court of appeals' reliance on Section 316 to justify the Commission's action that gave rise to the inconsistency with Section 308's "written application" requirement in the first place, an inconsistency petitioner did point out below. Moreover, the Commission's purported exercise of this "modification" authority, insofar as it denied petitioner the award of a paired DTV channel, failed to comport with the requirements of due process, and a remand is warranted on that ground alone.

I. THE COMMISSION'S ACTIONS VIOLATED SECTION 308's WRITTEN APPLICATION REQUIREMENT.

In establishing the administrative structure set forth in the Communications Act, Congress considered the requirement for a written application for station licenses to be sufficiently important to mandate this requirement not only for grants of such licenses, but also for "modifications" and "renewals" of those licenses. 47 U.S.C. § 308(a); Pet. App. 30a. Further, Congress permitted the Commission to dispense with a formal application only in the narrowest of circumstances — specified cases of "emergency" or "war" — and limited the duration of any authority granted without application (whether an initial license issuance, modification, or renewal) to the duration of the "emergency or war requiring it." *Ibid.*

Respondents urge this Court to accept the Commission's refusal to follow Congress' explicit direction in Section 308 as a reasonable interpretation of the statute entitled to deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Opp. Br. 9. However, an agency "may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.' " *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S. Ct. 1291, 1297 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). There is simply nothing in the structure of the Communications Act that permits the Commission to by-pass the written application requirement of Section 308 in issuing hundreds of new authorizations to broadcast DTV signals. Nor does labeling these new authorizations "modifications" excuse the Commission's failure to follow Congress' direction here.

A. The Commission's Action Was Not A Mere "Modification" Of Existing Licenses.

In *MCI Telecomm. Corp. v. American Tel. & Telegraph Co.*, 512 U.S. 218 (1994), this Court rejected a similar effort by the Commission to excuse a wholesale departure from the structure of the Communications Act by calling it a mere "modification." This Court held in *MCI* that the Commission's decision to eliminate the tariff requirements of 47 U.S.C. § 203 was not, as the agency contended, a valid exercise of its authority to "modify" such requirements, but rather was an unauthorized "basic and fundamental change[ ]" to the statutory scheme that could only be undertaken by Congress. 512 U.S. at 225.

The court of appeals and the respondents dismissed the relevance of *MCI* here, asserting that all television broadcasters (both those that were granted paired DTV licenses and those that were not) "will begin and end the

transition period broadcasting television programming to the public under very similar terms." Pet. App. 15a; Opp. Br. 11. Respectfully, this sweeping statement illustrates more clearly than any argument the failure of the court of appeals and the respondents to acknowledge the scope and impact of the Commission's blanket "issuance" of DTV broadcast licenses on April 3, 1997.

As respondents point out, DTV entails the introduction of an entirely new television technology, and viewers accordingly will be required to purchase special equipment (next-generation television sets or converter boxes) to receive the new digital signals. Opp. Br. 2. The conversion of the current base of tens of millions of analog television receivers to digital receivers will require a "massive investment" and will take many years to complete. Pet. App. 3a. For this reason, the Commission recognized the need for a transition period, during which broadcasters would be able to operate two channels, one transmitting analog signals that can be received on existing analog equipment, and a second channel (a "paired" channel) on which to transmit digital signals that can only be received on equipment conforming to the new DTV standard. *Ibid.* At the end of the transition period, all television signals must be transmitted using the DTV standard, and each licensee will be required to return one of its two paired channels to the Commission. *Ibid.*

In this context, the issuance by the Commission of a paired DTV channel to analog broadcasters goes far beyond "modifying" existing licenses, under either Section 316 or Section 308. It is the grant of a valuable, new entitlement that will place incumbent broadcasters in a substantially better competitive position than those, such as petitioner, who must make do with a single channel during the transition period. A broadcaster without a paired DTV channel faces the untenable choice of isolating its programming from the vast majority of the viewing audience (by operating its single

channel as a digital facility) or sacrificing for several years the truly remarkable advantages offered by the new digital medium (by operating its single channel as an analog facility).[2] As this Court memorably observed in *MCI*, "[i]t might be good English to say that the French Revolution 'modified' the status of the French nobility — but only because there is a figure of speech called understatement and a literary device known as sarcasm." 512 U.S. at 228. For the Commission and the court of appeals to characterize as a "modification" the grant to a select class of broadcasters of a whole new species of license represents a similar kind of statutorily insupportable understatement. If the Commission's grant of hundreds of paired DTV channels on April 3, 1997 qualifies as a "modification" of existing licenses under Section 316, there appears to be very little the agency cannot do in the name of this broad "modification" authority.

B. Even If The Commission's Action Were A "Modification" Of Existing Licenses, The Agency And The Court Of Appeals Must Still Reconcile Section 308 With Section 316.

Both Section 308 and Section 316 address the Commission's authority to "modify" station licenses. Section 308 explicitly requires that, except in times of emergency or war, the Commission can grant modifications only upon "written application therefor received by it," while Section 316 does not expressly require a written application. *Compare* Pet. App. 30a *to* Pet. App. 32a. Faced with the

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2. It is no "relief," as respondents suggest, to permit petitioner the "flexibility to use analog channels for DTV." Opp. Br. 12. Petitioner only has one channel. Broadcasting to an audience unable to receive its transmission is, at best, an illusory benefit. Those licensees who have been granted a paired channel do not face that untenable choice and, by the time they return their second channels to the Commission, likely will have acquired a commanding position over their competitors.

question of which section applied to the Commission's action below, the court of appeals was not entitled (as respondents urge) merely to accept the Commission's disregard of Section 308 in favor of Section 316 as a "reasonable harmonization" of conflicting statutory provisions. Opp. Br. 9. Instead, the court of appeals had an obligation to read the two provisions in a manner that gives meaning to both and to the Communications Act as a whole, a standard of review even respondents acknowledge. *See* Opp. Br. 9 ("statutory provisions should be read by reference to the whole law" (citing *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993)).

Petitioner offered a reading of Section 308 and Section 316 that gives meaning to both and suggests that Section 308, with its written application requirement, applied to the Commission's actions below. *See* Pet. 15-17 (Section 308 applies to modifications sought by or otherwise benefiting existing licensees, while Section 316 applies to actions by the Commission that restrict or negatively impact existing licenses). Under this reading, the Commission's grant of paired DTV channels constituted, at the very least, a beneficial "modification" to existing station licenses under Section 308, requiring written applications.[3]

Respondents do not address the merits of this reading, contending instead that the Court need not consider it because petitioner's reconciliation of the two statutory provisions was not presented or considered below. Opp. Br. 10. Petitioner respectfully submits that respondents take too narrow a view of the proceedings below. The question of whether the Commission's action qualified as a "modification" under

3. This reading is also consistent with the Commission's own action, since under the three-step procedure adopted by the agency for issuance of DTV licenses, broadcasters who were awarded a paired DTV channel were still required to submit written applications for them after the fact. Opp. Br. 5.

Section 316, rather than as a "modification" under Section 308, was squarely presented and considered by the court of appeals. Pet. App. 14a-15a. This alone would make review by this Court appropriate, even had petitioner never raised its argument prior to that decision. *E.g.*, *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). Here, petitioner has responded to the court of appeals' erroneous construction of Sections 308 and 316 by pointing out that the provisions must refer to different types of modifications in order to avoid the anomalous result that one provision in the statute essentially invalidates the other, without rational basis. Petitioner's proposed reconciliation of these provisions is not new argument; it is, at most, a further exposition of the same argument petitioner consistently has made below: Section 308 cannot be "read out" of the Communications Act under the guise of compliance with other provisions of the same statute. *Cf. Chase Manhattan Bank, N.A. v. American National Bank and Trust Company of Chicago*, 93 F.3d 1064, 1072 (2d Cir. 1996) (review appropriate where same basic argument advanced in district court is framed "in different terms" on appeal); *Dillon v. Duckworth*, 751 F.2d 895, 902 (7th Cir. 1985) (review permitted where party raised for the first time on appeal a "sub-issue[ ] of the main issue" presented below).[4]

4. Respondents also suggest that the court of appeals' interpretation of Section 316 raises no conflict among the circuits and, therefore, is not appropriate for certiorari. Opp. Br. 11. This Court may grant a petition for certiorari solely on the basis of a conflict within a single circuit and has done so in the past. *E.g.*, *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950); *John Hancock Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939). Moreover, the court of appeals' reading of Section 316 rests on premises that are inconsistent not only with a decision of a prior panel of the same court, but also with a decision of the U.S. Court of Appeals for the Ninth Circuit. Pet. 17. Both inconsistencies support review by this Court. *See Scarborough v. United States*, 431 U.S. 563, 567 n.4 (1977) (granting review in cases where there were both inter-circuit and intra-circuit conflicts).

Finally, the Commission's disregard of Section 308 is not, as suggested by the court of appeals, a reasonable application of Congress' direction regarding "eligible licensees" in Section 336(a)(1) of the Communications Act, 47 U.S.C. § 336(a)(1). Pet. App. 33a-34a. Section 336 did not, as respondents suggest (Opp. Br. 10), render superfluous the written application requirement of Section 308. In the first place, Congress is presumed to act with knowledge of existing law. *E.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) (" '[W]e assume that Congress is aware of existing law when it passes legislation.' " (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990))). This is particularly true, where, as here, the new provision is incorporated into the pre-existing statute. *Cf. Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). There is no basis to believe that Congress' adoption of Section 336 was intended in any way to avoid the longstanding requirements of Section 308.

Secondly, that Congress limited the pool of those eligible for "initial DTV licenses" in Section 336 does not mean that every broadcaster who met the eligibility criterion was entitled to a license. The purposes of the application process — to examine the suitability of each applicant — remain valid and appropriate. Indeed, Congress *always* prescribes some criteria for eligibility for entitlements or approvals in the broadcast industry. *See, e.g.*, 47 U.S.C. § 310(a) and (b) (imposing limitations on foreign ownership of all broadcast licenses). To accept respondents' logic would require the conclusion that written application requirements should never apply in any of those circumstances.

II. THE COMMISSION WAS REQUIRED TO EXPLAIN ITS ACTIONS BELOW AND TO GIVE A "HARD LOOK" TO PETITIONER'S EVIDENCE OF AN AVAILABLE PAIRED DTV CHANNEL.

Lastly, respondents continue their refusal to adhere to the requirement, articulated by Judge Leventhal in *Wait Radio v. F.C.C.*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), that the Commission must give a "hard look" to any allegations, supported by data, that a generally applicable rule made in the name of the "public interest" might, in particular cases, warrant exception. For the reasons described in the petition (Pet. 27-29), petitioner is entitled to consideration of its evidence that a paired digital channel can be awarded to it without undermining the DTV licensing scheme developed by the Commission, and to a clear explanation should the Commission determine that, notwithstanding this evidence, petitioner's application must be denied. Accordingly, at the very least, the Court should grant the petition, vacate the judgment below, and remand this matter with instructions that the Commission consider petitioner's evidence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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